(31,839, 31,840)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 337

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, ET AL., ETC., PETITIONERS,

vs.

EQUITABLE TRUST COMPANY OF NEW YORK, TRUSTEE IN BANKRUPTCY

No. 338

EQUITABLE TRUST COMPANY OF NEW YORK, TRUSTEE IN BANKRUPTCY, PETITIONER,

vs.

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Order for Omnibus Reclamation Proceedings.

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, et als., trading as KNAUTH, NACHOD & KUHNE, etc., etc., Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankruptcy No. 34,996.

2

On reading and filing the petition of Middleton S. Borland, Receiver herein, verified the 7th day of February, 1924, the order to show cause signed by Judge John C. Knox, United States District Judge, dated February 8th, 1924, the affidavit of A. McMillan, principal clerk of the "Evening Post" verified the 14th day of February, 1924, as to the publication of notice, and the affidavit of H. B. Duncan-Clark, verified the 18th day of February, 1924, as to the mailing of such notice, all pursuant to the directions contained in the aforesaid order to show cause, and the matter having come on for hearing before this court on the 19th day of March, 1924,

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and after hearing Ralph F. Colin of Counsel for the Trustee in support of the order asked for in the order to show cause, and Kremer and Leavitt, Esqs., appearing in opposition thereto, it is now, after due deliberation and on motion of James N. Rosenberg, attorney for the Receiver,

ORDERED that all creditors of the above named bankrupts and alleged bankrupt, and all other persons, firms or corporations who claim specific moneys, bonds, stocks, securities, or other property or any interest therein, or any part thereof, or the proceeds thereof, in the possession, custody, or control of the Receiver herein, or to which he or any Trustee in Bankruptcy herein may be now or hereafter entitled, or which may come into his possession, file their proofs of claim in and to said specific moneys, stocks, bonds, securities or other property, or any part thereof, or the proceeds thereof, duly sworn to, in the office of Robert P. Stephenson, Esq., as Special Master herein, at 32 Broadway, in the Borough of Manhattan, City of New York, on or before the 19th day of June, 1924, and on or before said date, serve a copy of such proof of claim upon the attorney for the Receiver, James N. Rosenberg, Esq., 74 Broadway, Borough of Manhattan, City of New York, and it is further

ORDERED that all creditors, persons, firms or corporations who shall fail to file such claims on or before the said 19th day of June, 1924, are forever barred and foreclosed from making or asserting any claim, title or ownership in and to any of said specific moneys, bonds, stocks, securities or other property, or any part thereof, or the proceeds thereof, now in or which may hereafter come into the possession of the Receiver or any Trustee in Bankruptcy herein, and it is further

ORDERED that a determination of all claims to any right, title or interest in and to any or all of the said specific moneys, stocks, bonds, securities or other property, or any part thereof, or the proceeds thereof, filed as aforesaid, be referred to Robert P. Stephenson, Esq., as Special Master, to hear the allegations, proofs and testimony of such creditors and claimants, and that the said Special Master report to this court his opinion thereon, and it is further

ORDERED that all creditors, or claimants, who have heretofore instituted reclamation proceedings herein and which are pending and undetermined are directed to intervene herein, and that petitions or affidavits in said reclamation proceedings heretofore instituted, be considered as claims filed pursuant to this order, and it is further

ORDERED that any claims or petitions in reclamation filed by any creditor within the period limited by this order shall, in the event that such claims or petitions in reclamation are not sustained as claims or petitions in reclamation, be deemed and accepted as filed as proofs of claim of general creditors, subject, however, to the right of the Trustee to contest upon the merits any such claim as a general creditor's claim, and it is further

ORDERED that no further notice to creditors or claimants herein of the entry of an order in this proceeding is necessary, beyond the mailing and publication of the order to show cause as therein directed.

WM. BONDY,
U. S. D. J.

New York, April 23, 1924.

10 **Petition for Reclamation.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, Alleged Bankrupts.	In Bankruptcy No. 34996-75.

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To the District Court of the United States:

The petition of Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hochstein, copartners doing business under the firm name and style of N. Latzko & A. Popper, appearing by Brodek & Raphael, their solicitors, respectfully shows:

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FIRST.—That at all the times hereinafter mentioned, petitioners were and that they now are copartners engaged in business as international bankers and maintaining a banking house in the City of Budapest, Hungary, under the firm name and style of N. Latzko & A. Popper.

13

SECOND.—That at all the times hereinafter mentioned, the above named Oscar L. Gubelman, Rollin C. Newton, Theodore W. Knauth, James F. Shaw, Herbert B. Smithers, John R. Hall and Mary W. Knauth were copartners engaged in business as international bankers and maintaining a banking house in the Borough of Manhattan, City, County and State of New York, in the Southern District of New York, under the firm name and style of Knauth, Nachod & Kuhne (hereinafter referred to as "K N & K").

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THIRD.—That heretofore and on June 15, 1923, at 10:30 P. M. an involuntary petition in bankruptcy was filed with Hon. John C. Knox, one of the judges of the United States District Court for the Southern District of New York, by three creditors of said K N & K, praying that said K N & K be adjudged bankrupts and on the same day, Middleton S. Borland was duly appointed temporary receiver in bankruptcy of the said K N & K by the said court, with the usual powers and authority of a temporary receiver in bankruptcy, and duly qualified as such receiver on June 16, 1923, and duly filed his official bond and entered into possession 15 of all of the property of the said alleged bankrupts. That on June 16, 1923, at 9:30 A. M. said involuntary petition in bankruptcy against said K N & K was duly filed in the office of the Clerk of said United States District Court. That thereafter and on July 20, 1923, said order of appointment of the said temporary receiver was, by an order of said court, duly made and entered in the office of the clerk of the said court, extended individually to all the copartners forming the copartnership known under the name and style of Knauth,

16 Nachod & Kuhne, and said Middleton S. Borland by said order of July 20, 1923, was duly appointed and duly qualified as temporary receiver for each and every individual member of said copartnership, and entered into possession of all of the property of the said alleged bankrupts.

On information and belief, said petitioners further show:

FOURTH.—That at all the times hereinafter mentioned, and prior to the appointment of said re-
17 ceiver, said K N & K acted as the New York correspondents of petitioners; that the nature of the dealings between petitioners and said K N & K was in general, the transmission of funds by petitioners or delivery to said K N & K of evidences of debt by petitioners to be collected by said K N & K for or on behalf of petitioners, and to be placed by said K N & K after collection as aforesaid, to the credit of petitioners' account with said K N & K, from which account payments were made from time to time by said K N & K upon order or request of petitioners, but that petitioners were not to draw
18 upon said K N & K against the deposit of evidences of debt as aforesaid, before the collection of the moneys due upon said evidences of debt by said K N & K.

FIFTH.—That petitioners had no agreement with said K N & K to treat evidences of debt deposited with said K N & K for collection or otherwise, as a deposit of cash, nor that an immediate credit should be given by said K N & K to petitioners upon the receipt of such evidences of debt.

SIXTH.—That petitioners did not treat evidences of debt deposited with said K N & K for collection

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or otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K N & K upon the receipt of any evidences of debt, nor did petitioners draw upon said K N & K against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K N & K.

SEVENTH.—That at all the times herein mentioned, said K N & K had one of their current accounts with the American Exchange National Bank (hereinafter referred to as "National Bank") with 20
its principal place of business in the Borough of Manhattan, said City, County and State, wherein said K N & K deposited certain checks and other evidences of debt payable to said K N & K through the New York Clearing House and otherwise.

EIGHTH.—That heretofore and on the 14th day of June, 1923, petitioners herein caused the Irving Bank-Columbia Trust Company of the City of New York to deposit for their account with said K N & K a check for Three thousand ($3,000) Dollars. That subsequently said check was deposited on said date by said K N & K with the National Bank to 21
be collected by said Bank for the account of said K N & K and credited to the current account of said K N & K with said Bank. That thereafter and on June 15, 1923, the day said petition in bankruptcy was filed against said K N & K and said temporary Receiver for said K N & K was appointed, as aforesaid, said bank presented said check for three thousand ($3,000) Dollars for payment through the New York Clearing House and collected the same, and credited the proceeds so collected to the current account of said K N & K with said bank.

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NINTH.—That on June 15, 1923, and on the same day as said petition in bankruptcy against said K N & K was filed and said temporary Receiver was appointed, as aforesaid, petitioners caused Goldman, Sachs & Company to deliver to said K N & K, a check for Fifteen thousand ($15,000) Dollars, to be collected by said K N & K for the account of petitioners, as aforesaid. That upon said date, petitioners likewise caused the National City Bank of New York to deliver to said K N & K a check for One thousand two hundred and ninety-
23 four ($1,294) Dollars, to be collected by said K N & K for the account of petitioners, as aforesaid.

TENTH.—That the checks mentioned in the preceding paragraph of this petition were deposited on said June 15, 1923, by said K N & K with said National Bank to be collected by said bank for the account of said K N & K and credited to the current account of said K N & K in said bank. That thereafter and on June 16, 1923, and subsequent to the filing of said petition in bankruptcy
24 and the appointment of the said temporary Receiver for said K N & K, said bank presented said checks for Fifteen thousand ($15,000) Dollars and One thousand two hundred and ninety-four ($1,294) Dollars respectively for payment through the New York Clearing House and collected the proceeds thereof, to wit, Sixteen thousand two hundred and ninety-four ($16,294) Dollars, and credited the said sum so received, to the current account of said K N & K with said bank.

ELEVENTH.—That at the time petitioners herein caused said checks aggregating Nineteen thousand two hundred and ninety-four ($19,294) Dollars to be delivered to said K N & K for collection and de-

posit to petitioners' account with said K N & K, as aforesaid, petitioners did not know of the insolvency of said K N & K, nor did petitioner have any knowledge or means of knowing the insolvency of said K N & K.

TWELFTH.—That at the time petitioners herein caused said checks hereinbefore described to be delivered to said K N & K petitioners had a credit balance with said K N & K, amounting to several thousand dollars and were not then, and have not been at any time since then, and are not now, indebted to said K N & K or to said Receiver.

THIRTEENTH.—That at the time said petition in bankruptcy against said K N & K was filed in this court, as aforesaid, the current account of said K N & K with said National Bank did not include Nineteen thousand two hundred and ninety-four ($19,294) Dollars which the petitioners herein caused to be deposited to their account with K N & K as aforesaid, nor were said Nineteen thousand two hundred and ninety-four ($19,294) Dollars at said time part of any money or moneys held by said bank for account of or on deposit from said K N & K, nor were said Nineteen thousand two hundred and ninety-four ($19,294) Dollars or any part thereof in possession of said K N & K.

FOURTEENTH.—That said K N & K accepted said three checks caused to be delivered to them by the petitioners herein as aforesaid, and deposited the same with said National Bank knowing full well that they were insolvent and unable to meet their obligations and at the time when said checks were so accepted and deposited by said K N & K, said K N & K knew of the preparation of the said

original involuntary petition in bankruptcy filed against them as aforesaid and had full knowledge and information concerning the same.

FIFTEENTH.—That at the time said three checks caused to be delivered to said K N & K by petitioners herein were received and collected by said K N & K as aforesaid, said K N & K wrongfully, fraudulently and with intent to defraud the petitioners herein held themselves out as a solvent and solid banking house, and the petitioners relied upon such representations by said K N & K so made and were thereby induced to deliver said checks to said K N & K in due course of petitioners' transactions with said K N & K, while in fact at said time said K N & K were insolvent and were unable to pay their debts in full to their knowledge.

SIXTEENTH.—That at the time of filing of said original petition in bankruptcy against said K N & K and the appointment of said Receiver as aforesaid, said alleged bankrupts were indebted to said National Bank for a loan of Two hundred and fifty-one thousand four hundred and fourteen and 99/100 ($251,414.99) Dollars and that the said bank had on deposit with it by said K N & K various stocks and bonds as security for said loan. That at all times mentioned herein the value of said stocks and bonds so deposited by said K N & K with said bank as said security for said loan, taken at their current market value, was greatly in excess of the amount of said loan, or any other indebtedness of said K N & K to said bank.

SEVENTEENTH.—That thereafter and on June 26, 1923, June 27, 1923, and June 28, 1923, said National Bank pursuant to the instructions received

from and given by said Receiver, sold and disposed of a portion of said stocks and bonds, to wit, to the amount of Twenty thousand four hundred and ninety-seven ($20,497) Dollars, and credited the proceeds of said sale to the liquidation of said loan of said K N & K with said bank. 31

EIGHTEENTH.—That thereafter and on July 12, 1923, said National Bank and said Middleton S. Borland, individually and as said Receiver wrongfully and unlawfully misappropriated, converted and applied the funds which said bank had on deposit to the current account of said K. N. & K. or its Receiver, to wit, Two hundred and twelve thousand and sixty-six and 16/100 ($212,066.16) Dollars, to the payment or liquidation of the balance of said loan due to the said bank from said K N & K. That on said date, said Receiver delivered to said bank his check for Eighteen thousand eight hundred and fifty-one and 83/100 $18,851.83) Dollars, in part payment of said loan, which payment together with the application of said Two hundred and twelve thousand and sixty-six and 16/100 ($212,066.16) Dollars, liquidated said loan of Two hundred and fifty-one thousand four hundred and fourteen and 99/100 ($251,414.99) Dollars. That included in the said sums so applied by said bank, was the sum of Nineteen thousand two hundred and ninety-four ($19,294) Dollars collected by said bank through the New York Clearing House by reason of three checks, one for Three thousand ($3,000) Dollars, drawn by Irving Bank-Columbia Trust Company, the second for Fifteen thousand ($15,000) Dollars, drawn by Goldman, Sachs & Company and the third for One thousand two hundred and ninety-four ($1,294) Dollars drawn by the National City 32 33

34 Bank of New York respectively, deposited by said K N & K with said bank after delivery of said checks by said petitioners to said K N & K as aforesaid.

NINETEENTH.—That thereafter and on July 12th, 1923, and subsequent to liquidation of said loan of Two hundred and fifty-one thousand four hundred and fourteen and 99/100 ($25,414.99) Dollars, aforesaid, the National Bank delivered to said Receiver the following unsold securities which it had
35 held as said security for said loan, to wit:

STOCKS

100 shares Manhattan Railway Company, guaranteed.
550 shares Central Aguirre Sugar Company of Porto Rico.
500 shares Mexican Seaboard Oil Company, Voting Trust Certificates.
500 shares Southern Pacific.
100 Shares Reading Company.
1500 shares Transcontinental Oil Company.
36 200 shares National Cloak & Suit Company common.
1200 shares Ray Consolidated Copper Company.
100 shares Underwood Typewriter Company common.
460 shares Fajardo Sugar Company of Porto Rico common.
200 shares Northern Pacific Railway.
400 shares Tennessee Copper & Chemical Corporation.
200 shares Mexican Cotton Oil Company preferred.
50 shares U. S. Steel Corporation.
100 shares Hudson Motor Company.

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BONDS

$40,000 Erie Railroad 10 year gold 4% Series A due April 1953.

$16,000 Rio de Janeiro 25 year 8% External Loan Sinking Gold Bonds due April 1947.

$10,000 Rio de Janeiro City 25 year 8% Sinking Fund Bonds due Oct. 1946.

$10,000 Chicago, Milwaukee & St. Paul General & Refunding 4½% Series A Bonds due 2014.

$8,000 St. Louis-San Francisco Railway Co. Income A 6% Bonds due 1960.

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$5,000 Chesapeake & Ohio Convertible Secured 5% Bonds due April, 1946.

TWENTIETH.—That heretofore and on said 12th day of July, 1923, and before the commencement of this proceeding, said Middleton S. Borland, individually and as said Receiver wrongfully, and unlawfully converted and misappropriated the proceeds of said three checks, to wit: the sum of Nineteen thousand two hundred and ninety-four and 00/100 ($19,294) Dollars as aforesaid, thereby damaging petitioners herein in said sum with interest thereon from the said day of conversion and mis- 39
appropriation.

TWENTY-FIRST.—That the said sum of Nineteen thousand two hundred and ninety-four ($19,294) Dollars collected by the National Bank as aforesaid, which said sum said National Bank and said Receiver wrongfully and unlawfully misappropriated, converted and applied to the liquidation of said loan from said bank to said K. N. & K. as aforesaid, was and is the property of petitioners and petitioners are entitled to immediate possession thereof by reason of the facts hereinbefore alleged.

40

TWENTY-SECOND.—That petitioners herein are expressly reserving all rights that they had, now have or may hereafter have against said National Bank by reason of the application of the proceeds of said three checks to the liquidation of the said loan from said National Bank to said K. N. & K., as heretofore more particularly described in this petition, and said petitioners, further reserve the right to collect from said National Bank all or any part of the proceeds of said three checks remaining uncollected from said Receiver, as a result
41 of this proceeding or otherwise.

TWENTY-THIRD.—That a demand for the payment of the said sum of Nineteen thousand two hundred and ninety-four ($19,294) Dollars has been duly made upon said Middleton S. Borland, but said Middleton S. Borland has failed and refused and continues to refuse to pay and deliver said sum or any part thereof to petitioners.

WHEREFORE your petitioners pray that said Middleton S. Borland, individually and as said Receiver be directed:

42 1. To pay to petitioners herein the sum of Nineteen thousand two hundred and ninety-four ($19,294) Dollars, with interest thereon from July 21, 1923.

2. For such other and further relief as the court may deem fit to grant in the premises, besides the costs and disbursements of this proceeding.

ALEXANDER LATZKO,
WILLIAM LATZKO,
CHARLES LATZKO,
SAMUEL POPPER,
EMIL HOCHSTEIN,
By BRODEK & RAPHAEL,
Attorneys-in-fact.

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State of New York,
City of New York,
County of New York, } ss.:

Charles A. Brodek, being duly sworn, deposes and says: That he is a member of the firm of Brodek & Raphael, attorneys-in-fact for petitioners herein; that he has read and knows the contents of the foregoing petition; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

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Deponent further says that the reason why this verification is not made by any of the petitioners and is made by him, is that the petitioners are alien residents and citizens of Budapest, Hungary, and none of them is within the United States; the sources of deponent's information and the grounds of his belief as to all matters not stated in said complaint upon knowledge, are correspondence from petitioners, written documents relating to the subject matter of this petition in possession of deponent and statements by the agents and representatives of the Receiver.

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CHARLES A. BRODEK.

Sworn to before me this
24th day of January, 1924.

E. H. ROSENSTOCK,
Notary Public,
N. Y. County.

46 **Trustee's Answer.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, Alleged Bankrupts.	In Bankruptcy. No. 34,996.

47

To the Honorable Judges of the United States District Court for the Southern District of New York:

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The answer of Middleton S. Borland as receiver herein to the petition of Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Rochstein, doing business under the firm name and style of N. Latzko & A. Popper, respectively shows:

FIRST.—He denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs eleventh, fourteenth, and fifteenth of the petition.

SECOND.—He denies each and every allegation contained in paragraphs thirteenth, seventeenth, eighteenth (except the allegation "that on said date, said Receiver delivered to said bank his check for eighteen thousand eight hundred and fifty-one and 83/100 dollars, $18,851.83, in part payment of said loan, which payment together with the application of said two hundred and twelve thousand and sixty-two and 16/100 dollars, $212,066.16, liquidated said loan of two thousand and fifty-one thousand four hundred and fourteen and 99/100 dollars, $251,414.99"), twentieth and twenty-first of the petition.

THIRD.—The record of Knauth, Nachod & Kuhne's balance, deposits, withdrawals and final balance with the American Exchange National Bank for June 14th and 15th, 1923, is as follows:

1923	Balance at Opening of Business	Deposits	Withdrawals	Balan at Clo of Busin
June 14	$46,313.00	221,300.26	221,686.71	45,92
June 15	45,926.55	528,010.39	497,814.73	76,12

The balance of two hundred twelve thousand sixty-six and 66/100 dollars ($212,066.16) remaining with the American Exchange National Bank at the close of business on June 15, 1923, differs from the figure of seventy-six thousand one hundred twenty-two and 21/100 dollars ($76,122.21) as above set forth, due to the fact that some of the "withdrawals" entered on Knauth, Nachod & Kuhne's records were in the form of checks on the American Exchange National Bank which were not

52 honored and some of the "deposits" include checks to the order of Knauth, Nachod & Kuhne upon which payment was stopped.

FOURTH.—In the course of the liquidation of its loan to Knauth, Nachod & Kuhne the American Exchange National Bank sold the following securities pledged with it. (Those bearing no remarks were owned by customers.)

New York Central 6's 1935—$3,000.00 (Firm Owned.)

53 100 Shares Fajardo Sugar (Joint Account.)

500 Shares Mexican Seaboard Voting Trust Certificates (Firm Owned and Joint Account/30.)

The bank returned to the Receiver the following securities:

Chesapeake & Ohio 5's....	$ 5,000.00	
Chicago, Milwaukee & St. Paul 4½'s	10,000.00	
Erie Conv. 4's	40,000.00	
Rio de Janeiro 8's 1946 ...	10,000.00	
54 Rio de Janeiro 8's 1947 ..	16,000.00	
St. Louis & San Francisco 6's 1960	8,000.00	
American Cotton Oil	200	
Central Aguirre Sugar	550	
Fajardo Sugar	460	(Joint A/C except 50)
Hudson Motors	100	
Manhattan Railway Guar. Ctfs.	100	
Mexican Seaboard V. T. Ctfs.	500	(Firm owned & Joint A/C)

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National Cloak & Suit Co., Common	200	
Northern Pacific	200	
Ray Cons. Copper	1,200	
Reading	100	
Southern Pacific	500	
Tennessee Copper & Chemical	400	
Transcontinental Oil	1,500	
Underwood Typewriter	100	(Firm owned)
United States Steel	50	

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WHEREFORE, the Receiver prays that the petition herein be denied, without prejudice to the petitioners' rights to refile their petition in an Omnibus proceeding to be started herein.

JAMES N. ROSENBERG,
Attorney for the Receiver,
74 Broadway,
Borough of Manhattan,
City of New York.

State of New York,
County of New York, } ss.:

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Middleton S. Borland, being duly sworn, deposes and says, that he is the Receiver herein; that he has read the foregoing answer and knows the contents thereof and that the same are true to the best of his knowledge, information and belief.

MIDDLETON S. BORLAND.

Sworn to before me this
day of February, 1924.

ANNA T. MULVANEY,
Notary Public.
Kings Co. Clerk's No. 442, Reg. No. 5136.
Cft. filed in N.Y. Co. Clks. No. 373, Reg. No. 5310.
Commission expires March 30, 1925.

58 **Proceedings Before Special Master.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy.

In the Matter
of
KNAUTH, NACHOD & KUHNE,
59 Bankrupt.

Before—ROBERT P. STEPHENSON, Esq.,
Special Master.

32 Broadway, New York City,
August 19, 1924, at 2 p. m.

Hearing on reclamation of Latzko & Popper, proceeded pursuant to notice.

APPEARANCES:

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Messrs. ROSENBERG & BALL, Attorneys for Trustee, by George G. Ernst, Esq., Ralph F. Colin, Esq., of Counsel.

Messrs. BRODEK & RAPHAEL, Attorneys for Claimant, by C. A. Brodek, Esq., B. M. Komar, Esq., of counsel.

Hearing adjourned, by consent, to August 20, 1924, at 2 p. m.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy.

In the Matter
of
KNAUTH, NACHOD & KUHNE,
Bankrupt.

62

Before—ROBERT P. STEPHENSON, Esq.,
Special Master.

32 Broadway, New York City,
August 20, 1924, at 2 p. m.

Hearing on Reclamation of Latzko & Popper proceeded pursuant to adjournment.

APPEARANCES:

Messrs. ROSENBERG & BALL, Attorneys for Trustee, by George G. Ernst, Esq., Ralph F. Colin, Esq., of Counsel. 63

Messrs. BRODEK & RAPHAEL, Attorneys for Claimant, by C. A. Brodek, Esq., B. M. Komar, Esq., of Counsel.

Mr. Ernst: With respect to the claim of Latzko & Popper, the following is stipulated:

(1) The petition and the Receiver's answer as filed shall be deemed the pleadings in this proceeding except as hereinafter specified.

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(2) Paragraph Fourth of the petition shall be deemed denied except that the Receiver, and or the Trustee, admits "that at all times hereinafter mentioned and prior to the appointment of said Receiver, Petitioners maintained a current checking account with K. N. & K. that your petitioners did not draw upon said K. N. & K. against said account as aforesaid before the collection by said K. N. & K. of the moneys due upon such evidences of debt as were deposited by the petitioners herein to their account with said K. N. & K."

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(3) It is agreed that throughout the petition the reference to "the day said petition in bankruptcy was filed against said K. N. & K.," or any similar allegation, shall mean only "June 15, 1923" (this refers particularly to paragraphs Eighth, Ninth, Tenth, Eleventh and Thirteenth).

(4) It is agreed that wherever in the petition reference is made to a deposit by K. N. & K. with the American Exchange Bank "for collection" or "to be collected" or such similar phrase, the meaning shall be a deposit by K. N. & K. in its current
66 checking account with the bank in the ordinary course of business. (This refers particularly to paragraphs Eight, Nine, Ten, Eleven and Thirteen.)

(3) It is agreed that wherever in the petition reference is made to a deposit by or for the account of the petitioners with K. N. & K. "for collection" or "to be collected," such allegation shall be deemed denied by the Trustee, and or the Receiver. (This refers particularly to paragraphs Eight, Nine, Ten, Eleven and Thirteen.)

(6) The denial of the allegations contained in Paragraph Eleven of the petition, subject to the

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provisions of this stipulation, is to be deemed withdrawn.

(Then followed oral argument.)

Mr. Brodek: At this time, I wish to introduce into evidence the three checks referred to in the argument, and it is understood that the endorsements form part of the exhibit.

(Received in evidence and marked Claimant's Exhibit No. 1, August 20, 1924.)

Mr. Brodek: I also offer in evidence the letter of Goldman, Sachs & Co., in which the $15,000 check was sent to K. N. & K. 68

(Received in evidence and marked Claimant's Exhibit No. 2, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the Receiver to the American Exchange National Bank dated June 16, 1923.

Mr. Colin: That is admitted, subject to correction.

(Received in evidence and marked Claimant's Exhibit No. 3, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the Receiver to the same bank, dated June 22, 1923.

(Received in evidence and marked Claimant's 69
Exhibit No. 4, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the Receiver to the same bank, dated June 26, 1923.

(Received in evidence and marked Claimant's Exhibit No. 5, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the Receiver to the same bank, dated July 12, 1923.

(Received in evidence and marked Claimant's Exhibit No. 6, August 20, 1924.)

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Mr. Brodek: I offer in evidence a letter from the bank, by its assistant cashier, to the Receiver, dated June 25, 1923.

(Received in evidence and marked Claimant's Exhibit No. 7, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the bank, through its auditor, to the Receiver, dated June 25, 1923.

(Receiver in evidence and marked Claimant's Exhibit No. 8, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from
71 the bank to the Receiver, dated June 26, 1923.

(Received in evidence and marked Claimant's Exhibit No. 9, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the bank to the Receiver, dated June 27, 1923.

(Received in evidence and marked Claimant's Exhibit No. 10, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from the bank to the Receiver, dated June 28, 1923.

(Received in evidence and marked Claimant's Exhibit No. 11, August 20, 1924.)

Mr. Brodek: I offer in evidence a letter from
72 the bank to the Receiver, dated July 12, 1923.

(Received in evidence and marked Claimant's Exhibit No. 12, August 20, 1924.)

Mr. Brodek: There is a further stipulation which has just been suggested, as to which I have not quite made up my mind because it injects a fresh element into the situation.

Mr. Colin: Mr. Brodek contends that the mere crediting of the account without permitting the depositor to draw against it does not affect the situation. All I would like from him is a stipulation covering the entries in the books. I have just some from the American Exchange Bank and I know, as

73

a fact, that credit was given on the 15th. I also know, as a fact, that on K. N. & K.'s books credit was given to Latzko & Popper on the 15th, and I would like him to stipulate those facts subject to correction.

Mr. Brodek: It is stipulated that all items deposited with the American Exchange Bank of K. N. & K. on June 15th were placed on the credit side of K. N. & K.'s account on the books of the bank as of that date, and the accounts thus placed on the credit side of the account of K. N. & K. on that day included the two checks deposited in favor 74 of Latzko & Popper on that day, and that some of the items thus placed on the credit side on that day were subsequently stopped and charged back against K. N. & K. by the bank.

Mr. Colin: It is so agreed, the foregoing stipulation and the following one being subject to correction on the facts.

It is further stipulated by and between the parties hereto that Latzko & Popper, the petitioners herein, were credited, on the books of K. N. & K., as of June 15, 1923, with the two checks deposited for their account in the respective amounts of $15,000 and $1,294. 75

Mr. Brodek: That is so agreed.

Hearing Closed.

(Briefs to be submitted by September 3, 1924.)

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Report of Special Master.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, doing business as copartners under the firm name and style of KNAUTH, NACHOD & KUHNE, and OSCAR L. GUBELMAN, ROLLIN C. NEWTON, JAMES F. SHAW, HERBERT B. SMITHERS, JOHN R. HALL and THEODORE W. KNAUTH, individually, Bankrupts, and MARY W. KNAUTH, Alleged Bankrupt.	In Bankrutcy #34996. Report #6 of Special Master.

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To the Honorable Judges of the District Court of the United States for the Southern District of New York:

By order of this court dated April 23, 1924, this case was referred to me as Special Master, to hear the allegations, proofs and testimony of all persons filing reclamation petitions, and to report to the court my opinion thereon.

79

RECLAMATION OF N. LATZKO and A. POPPER.

The petition is for an order directing the trustee to turn over to the petitioner the sum of $19,294, with interest from July 12, 1923, and for further relief.

The claim arises out of three checks delivered to the Receiver, as follows:

A.—Cashier's check of the Irving Bank-Columbia Trust Company, dated June 14, 1923, for $3,000. 80

B.—Cashier's check of the National City Bank of New York, dated June 15, 1923, for $1,294.

C.—Check of Goldman, Sachs & Co., dated June 15, 1923, drawn on the Bank of America for $15,000.

STATEMENT OF FACTS.

Petitioner is a co-partnership engaged in business as international bankers in the City of Budapest, Hungary. They maintained a current checking account with Knauth, Nachod & Kuhne, and did not 81 draw against said account before the collection by Knauth, Nachod & Kuhne of the monies due upon such evidences of debt as were deposited by the petitioner to their account with Knauth, Nachod & Kuhne.

A. On June 14, 1923, the petitioner caused the Irving Bank-Columbia Trust Company to deliver to Knauth, Nachod & Kuhne a check which reads as follows:

82 "TREASURER'S CHECK.

6 New York, 6/14/23. No. K10217

IRVING BANK-COLUMBIA TRUST COMPANY
Woolworth Building

PAY TO THE ORDER OF
Knauth, Nachod & Kuhne, New York City,
$3,000.00 Three thousand and 00/100—Not Over
Three Thousand ($3,000.) Dollars
Through New York Clearing House

83 Countersigned:

F. J. MORAN. G. W. BUGEL,
Treasurer."

and Knauth, Nachod & Kuhne gave the Irving Bank-Columbia Trust Company a receipt which reads as follows:

"To be signed and returned to
IRVING BANK-COLUMBIA TRUST COMPANY
NEW YORK, N. Y.

FOREIGN PAYING AND RECEIVING DEPT.

84 AMSTERDAMSCHE BANK,
AMSTERDAM, HOLLAND.

New York, 6/14/23.

Received from the

IRVING BANK-COLUMBIA TRUST COMPANY, $3,000.
Three Thousand and 00/100.....Dollars
By order of POSTER UNGARISCHE COMMERCIAL BANK, BUDAPEST, for account of N. LATZKO AND A. POPPER, BUDAPEST.

KNAUTH, NACHOD & KUHNE,
120 Broadway, N. Y.

PAYING & RECEIVING FOREIGN
J. ROSENBLUM
Signed by

STAMP
FOREIGN
Jun 29 1923
DEPARTMENT

85

STAMP
RECEIVED PAYMENT
June 14, 1923

KNAUTH, NACHOD & KUHNE,
New York

as per Cable of 6/13/23

DUPLICATE Per....."

(Paragraph 8th of Petition, Claimant's Exhibit I).

On that day Knauth, Nachod & Kuhne credited 86
the petitioner with the amount of this check, and on the same day deposited the same with the American Exchange National Bank, indorsing the check as follows:

"Pay to AMERICAN EXCHANGE
NATIONAL BANK
Or Order
Jun 14, 1923
KNAUTH, NACHOD & KUHNE,
NEW YORK, N. Y. (21)
1-548 1-548"

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and the American Exchange National Bank on that same day credited Knauth, Nachod & Kuhne with the amount of that check. The check was collected by the American Exchange National Bank through the New York Clearing House on June 15, 1923, during banking hours.

B. On June 15, 1923, the petitioner caused the National City Bank of New York to deliver to Knauth, Nachod & Kuhne a check which reads as follows:

88

"No. F. T. 261365 NEW YORK, June 15, 1923.
CASHIER'S CHECK
THE NATIONAL CITY BANK OF NEW YORK
PAY TO THE ORDER OF
KNAUTH, NACHOD & KUHNE, New York..$1294.00
FAVOR N. LATZKO & A. POPPER, Budapest.....
One Thousand Two Hundred Ninety-Four and
00/100 ..... Dollars
Payable only through New York
Clearing House
N. G. LENFESTEY, Cashier.
89 J. W. ALLALE, Asst. Cashier."

Knauth, Nachod & Kuhne, on the same day, credited the petitioner with the amount of this check. On the same day, June 15, 1923, Knauth, Nachod & Kuhne deposited this check with the American Exchange National Bank after putting on the following indorsement:

"Pay to AMERICAN EXCHANGE
NATIONAL BANK
Or Order
Jun 15, 1923
90 KNAUTH, NACHOD & KUHNE
NEW YORK, N. Y. (21)
1-548 1-548"

and the American Exchange National Bank, on that same day, credited Knauth, Nachod & Kuhne with the amount of this check. The American Exchange National Bank received payment of this check through the New York Clearing House on June 16, 1923, during banking hours.

On June 15, 1923, the petitioner caused Goldman, Sachs & Co. to deliver to Knauth, Nachod & Kuhne a check which reads as follows:

91

"GOLDMAN, SACHS & CO.
No. 69619 NEW YORK, Jun 15, 1923
THE BANK OF AMERICA
PAY TO THE ORDER OF
KNAUTH, NACHOD & KUHNE.....$15,000.
.....Fifteen Thousand Dollars.....
Passed
FWY J. M. HUMPHREY"

and with this check, delivered to Knauth, Nachod & Kuhne a letter reading as follows:

92

"New York, June 15, 1923.

Knauth, Nachod & Kuhne,
New York.

We hand you herewith our check for #Fifteen Thousand#.....Dollars for account of Latzkopper, Budapest, by order of Julius Baer & Co., Zurich, as per cable, June 15, from same.

Please sign the attached receipts and return to bearer.

$15,000.—

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GOLDMAN, SACHS & CO."

(Paragraph 9th of petition, Claimant's Exhibits I and II.)

Knauth, Nachod & Kuhne, on the same day, credited the petitioner with the amount of this check. On the same day, June 15, 1923, Knauth, Nachod & Kuhne deposited this check with the American Exchange National Bank, after putting on the following indorsement:

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"Pay to AMERICAN EXCHANGE
NATIONAL BANK
Or Order
Jun 15, 1923
KNAUTH, NACHOD & KUHNE
NEW YORK, N. Y. (21)
1-548 1-548"

And the American Exchange National Bank on that day credited Knauth, Nachod & Kuhne with the amount of this check. The American Exchange
95 National Bank received payment of this check through the New York Clearing House on June 16, 1923, during banking hours.

After banking hours on June 15, 1923, a petition in involuntary bankruptcy was presented to Judge Knox and an order appointing Middleton S. Borland, Receiver, was signed by him. Both of these papers were filed with the Clerk of the United States District Court on the morning of June 16, 1923, before banking hours.

On June 16, 1923, Middleton S. Borland, the Receiver, wrote the American Exchange National Bank, stating that he had been appointed Receiver,
96 and directing the Bank not to pay any checks drawn against the account of Knauth, Nachod & Kuhne, and to hold the funds on deposit at the opening of business on June 16th for his account, and until further notice from him. (Claimant's Exhibit III.) Later, the Receiver approved of the sales by the American Exchange National Bank of certain securities, which were held by the American Exchange National Bank as collateral for loan made by it to Knauth, Nachod & Kuhne, and the proceeds of said sale were credited on account of such loan.

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On July 12, 1923, the Receiver gave his check for $18,851.83 to the American Exchange National Bank in liquidation of a call loan of April 22, 1923, for $250,000, and the American Exchange National Bank returned to the Receiver the unsold securities, and set off in part payment of the $250,000 loan the balance of the account then standing to the credit of Knauth, Nachod & Kuhne. In this balance was included the proceeds of the checks above referred to.

The foregoing facts are taken from the allegations of the petition which have not been denied by 98
the Trustee, and from the stipulations made by the parties at the hearing and from the exhibits introduced in evidence.

There was no special agreement between the petitioner and Knauth, Nachod & Kuhne, and therefore checks deposited by the petitioner with Knauth, Nachod & Kuhne became their property, and the petitioner became an immediate creditor for the amount deposited, even before the same was collected. (*Burton* v. *U. S.*, 196 U. S., 283; re *Jarmulowsky*, 249 Fed., 319.) But in this case the check of the National City Bank for $1,294 had on it 99
these words

> "FAVOR N. LATZKO & A. POPPER, Budapest"

and the check for $15,000 from Goldman, Sachs & Co. was accompanied by a letter which stated that it was

> "For account of Latzkopper, Budapest, By order of JULIUS BAER & CO., Zurich,"

and the check for $3,000 received from the Irving Bank-Columbia Trust Company was received by Knauth, Nachod & Kuhne according to their receipt

100 "For account of N. Latzko and A. Popper, Budapest."

These words on the checks or accompanying them as part of the transaction indicate a special agreement with the drawers of the checks, under which Knauth, Nachod & Kuhne undertook, as agent, to collect these checks for Latzko and Popper, and title to the same would not pass to Knauth, Nachod & Kuhne.

101 (*White* v. *National Bank*, 102 U. S., 658;
Smith v. *Motley*, 150 Fed., 266;
Commercial Bank v. *Armstrong*, 148 U. S., 50;
Evansville Bank v. *German-American Bank*, 155 U. S., 556.)

I should have no doubt that the property in the above checks and the proceeds thereof belonged to Latzko and Popper, were it not for the allegation in the petition that Latzko and Popper caused the banks and Golden, Sachs & Co. to deliver these checks to Knauth, Nachod & Kuhne. I must con-
102 clude from this allegation of the petition that the banks delivering these checks to Knauth, Nachod & Kuhne and Goldman, Sachs & Co. were acting as agents of the petitioner, and the delivery of the checks to Knauth, Nachod & Kuhne was the same as if they had been delivered by Latzko and Popper themselves. I do not believe that *White* v. *National Bank* (supra) applies where a person deposits a check in a bank where he has an account against which he draws. The evidence shows that Latzko and Popper did not, in fact, draw against their account with Knauth, Nachod & Kuhne until the items deposited were actually collected, but the

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evidence does not show that they had no *right* to draw before that time, and the burden is upon the petitioner to prove a special agreement showing that it had no *right* to draw before collection. This deposit of checks, accompanied by a notice that they are for the account of the depositor or in favor of the depositor, does not prove a special agreement, as would be the case, if the depositor had indorsed on the checks "For collection"—(*Jarmulowsky*, supra). In *White* v. *National Bank* (supra), it was held that where A, the payee of a check, indorsed it to B "for account of A," B did not get title to 104
the check, but was merely the agent to collect it for A's benefit. In the *White* case, however, B was not a bank in which A had an account against which he could draw. I cannot believe that one who deposits a check in his own bank, in which he has an account, with a notation that it is for his (the depositor's) account, means that the title of the check is to remain in the depositor until the bank collect it. In fact, it seems that a deposit for the account of a person indicates an intention to pass title to the bank, and to receive immediate credit on the depositor's account. It is not, in my opinion, the equivalent of a deposit for collection. 105

I therefore recommend an order dismissing the petition with costs and disbursements against the petitioner.

I return herewith the testimony before me, with the exception of the exhibits which are retained by the parties.

Dated, New York, September 24th, 1924.

Respectfully submitted,

ROBERT P. STEPHENSON,
Special Master.

106 **Order Appealed From.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of OSCAR L. GUBELMAN, et al., trading as KNAUTH, NACHOD & KUHNE, etc., Bankrupts.	In Bankruptcy No. 34996.
In the Matter of Reclamation Claim of LATZKO & POPPER.	Re Special Master's Report No. 6.

107

This matter having duly come on to be heard on January 21, 1925, upon motion of Rosenberg & Ball, attorneys for the Trustee herein, for an order confirming report No. 6 of the Special Master herein, NOW, upon reading and filing said report of the Special Master and the papers referred to therein and thereto annexed, and upon all of the proceedings had herein, it is, after due consideration, on motion of Rosenberg & Ball, attorneys for the Trustee herein,

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ORDERED that the said report of the Special Master be and the same hereby is in all respects confirmed, and the reclamation claim of Latzko & Popper be and the same hereby is dismissed; and it is

109

FURTHER ORDERED that the Trustee be and he hereby is authorized and directed to pay Robert P. Stephenson, as Compensation for his services as Special Master herein, $100.00, and that the Trustee recover from claimant herein, as costs and disbursements, the said $100.00, together with stenographer's fees of $6.30, and in addition thereto a docket fee of $20, amounting in all to $126.30, and have judgment and execution therefor; and it is

FURTHER ORDERED that, for the purpose of effecting collection of said costs and disbursements, 110
the Trustee be, and he hereby is, authorized to offset said amount against any dividend or dividends which may be declared herein in favor of said claimant.

Dated, New York, February 20, 1925.

A. N. HAND,
U. S. D. J.

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112 **Opinion of District Court.**

No. 1024.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
KNAUTH, NACHOD & KUHNE,
Bankrupts.

B. No. 34996.

113

Report No. 6 of Special Master—Reclamation of N. Latzko and A. Popper.

BRODEK & RAPHAEL, Solicitors for Claimants, Charles A. Brodek and Borris M. Komar, Counsel.

ROSENBERG & BALL, Solicitors for Trustee, George G. Ernst and Ralph F. Colin, Counsel.

114 AUGUSTUS N. HAND, District Judge:

The claimants had a general checking account with the bankrupts. They contend that three checks drawn by New York banks which they caused said banks to deliver to the bankrupts prior to the filing of the petition in bankruptcy were deposited with the bankrupts for collection. These checks were credited by the bankrupts to claimants' account when received but the first was collected the day the petition was filed—though earlier in the day, and the other two were collected the day after the filing of the petition. Each check was

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drawn by a New York Bank to the order of the bankrupts. In the case of the first check the bankrupts gave the drawer a receipt reciting that the deposit was "for account of N. Latzko and A. Popper, Budapest."

The second check through drawn to the order of the bankrupts bore on its face the words "Favor N. Latzko and A. Popper, Budapest."

The third check was drawn to the bankrupts' order, had no possible limitation on its face, but was accompanied by a letter from the drawer stating it was "for account Latzkopper, Budapest." 116

The proceeds of the first check clearly became part of the assets of the bankrupts prior to the hour when the petition was filed. I can see no reason for invoking the rule that the law will take no account of the fractions of a day to defeat the bankrupts' title. It would to as tenable to hold that two lis pendens filed at different hours on the same day imposed an identical lien. The claimant cannot prevail as to the first check and the master's report as to it should be confirmed.

In respect to the last two checks, it is true that "for account of" ordinarily means for collection and that an agency may be indicated by a letter of instruction or by notation as well as by a restrictive endorsement. *Boone County National Bank* v. *Latimer*, 67 Fed., 27. Nor does a credit by the bank receiving the check without the acquiescence of the customer, nor an occasional permission to make drafts on the account which would naturally be met from the proceeds of the check when collected, alter an understanding that the check is deposited for collection only. *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566; *Matter of Jarmulowsky*, 249 Fed., 320. But here 117

118 the deposit was in the claimants' ordinary checking account. Instructions to place it to such account emanating from them, and due to the necessity of indicating for whom the check was received, create a different situation from that in *White* v. *Miners National Bank*, 102 U. S., 658, where the deposit was in a bank where there was an endorsement for account of A to the order of a bank in which A had no checking account.

In spite of the importance of giving words in commercial use a uniform effect so far as may be
119 just and reasonable, I think the effect sought to be given here to the words "for account of" is contrary to the natural meaning of the words under the circumstances. The case seems to fall within the reasoning of *Burton* v. *U. S.*, 196 U. S., 283, and the rule laid down in *Matter of Jarmulowsky*, 249 Fed., at page 321. Judge Hough there said:

> "In the absence of any special agreement between these depositors and their bank, the title to the checks would have passed to the bank, and the bank become merely a debtor to
> 120 the depositor for the amount entered in the passbook * * *. Whether there was any other or special agreement made is a question of fact."

While the situation is not free from doubt. I am of the opinion that the Master's Report as to the Latzko and Popper claim should be confirmed.

A. N. H.,
D. J.

February 17, 1925.

Petition for Appeal. 121

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, 122

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as copartners doing business under the firm name and style of H. LATZKO and A. POPPER, 123

Petitioners-Appellants.

To the Honorable District Judges of the United States District Court for the Southern District of New York:

The above named petitioners conceiving themselves aggrieved by the Final Order and Decree en-

tered on the 20th day of February, 1925, in the above entitled matter denying petition of N. Latzko and A. Popper to reclaim from the Trustee the proceeds of three (3) certain checks more particularly described in said petition and totalling the sum of $19,294, do hereby petition for an appeal from said order and decree and each and every part thereof to the United States Circuit Court of Appeals for the Second Circuit and pray that their appeal may be allowed and a citation granted directed to the Trustee, commanding him to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records and proceedings in said matter, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

BRODEK & RAPHAEL,
Solicitors for Petitioners,
Office & P. O. Address,
67 Wall Street,
Borough of Manhattan,
City of New York.

Appeal is hereby allowed.

AUGUSTUS N. HAND,
U. S. D. J.

Dated, February 28th, 1925.

Assignment of Errors. 127

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, 128

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as copartners doing business under the firm name and style of H. LATZKO and A. POPPER, 129

Petitioners-Appellants.

The above named petitioners make in connection with their petition of appeal the following assignment of errors, and say that the final order entered herein on the 20th day of February, 1925, is erroneous and against the just rights of said petitioners for the following reasons:

130 *Assignment of Errors.*

1. The District Court erred in holding that the title to the proceeds of a certain check for $3,000 drawn by the Irving Bank-Columbia Trust Company and collected by said bankrupts on June 15th, 1923, was on the day the petition in bankruptcy herein was filed in said bankrupts and not in said petitioners.

2. The District Court erred in holding that the title to the proceeds of a certain check for $15,000 drawn by Goldman, Sachs & Company and collected
131 by the Receiver herein on June 16th, 1923, was on the day the petition in bankruptcy herein was filed in said bankrupts and not in said petitioners.

3. The District Court erred in holding that the title to the proceeds of a certain check for $1,294 drawn by the National City Bank of New York and collected by the Receiver herein on June 16th, 1923, was on the day the petition in bankruptcy herein was filed in said bankrupts and not in said petitioners.

4. The District Court erred in holding that the
132 deposit of checks by a depositor to his current account with a Bank accompanied by instructions that said checks are deposited "for account of" or "in favor of" the depositor was not equivalent in law to a deposit of said checks for collection.

5. The District Court erred in holding that the instructions showing that checks were deposited by a depositor to his general account with a bank "for account of" or "in favor of" of the depositor were ambiguous and could be explained by extrinsic evidence.

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6. The District Court erred in holding that the deposit of checks by a depositor to his current account with a bank accompanied by instructions that said checks are deposited "for account of" or "in favor of" the depositor did not constitute a special agreement between the depositor and the bank that said deposit was for collection.

7. The District Court erred in holding that in the absence of special agreement between a depositor and a bank wherein the depositor has a general checking account the established course of dealings 134
between said depositor and the bank should be disregarded in ascertaining whether the depositor had or had not a right to draw as against his deposit prior to the collection by the bank of the checks deposited by him.

8. The District Court erred in holding that in the absence of special agreement between a depositor and a bank wherein depositor has a general checking account the established course of dealings between said depositor and the bank showing that said depositor never drew against his deposits of checks until the same were collected by the bank, 135
does not raise the presumption that the depositor had no right to draw against his deposits of checks before the collection of same by the bank.

9. The District Court erred in holding that where question of the possession of assets by the bankrupt is concerned, fractions of the day on which the petition in bankruptcy is filed should be considered by the court.

WHEREFORE said petitioners pray that said final order be reversed with costs and that said

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District Court be directed to grant the petition of reclamation herein and to order the Trustee of said bankrupts to pay to petitioners herein the sum of $19,294 with interest thereon from July 12th, 1923, and for such other and further relief as may be just and proper.

BRODEK & RAPHAEL,
Solicitors for Petitioners,
Office & P. O. Address,
67 Wall Street,
137 Borough of Manhattan,
New York City.

Citation.

By the Honorable John C. Knox, one of the United State District Judges for the Southern District of New York, in the Second Circuit. To Middleton S. Borland, Trustee in Bankruptcy, and to Oscar L. Gubelman, James F. Shaw, Rollin C. Newton, Herbert B. Smithers,
138 John R. Hall, Mary W. Knauth and Theodore W. Knauth, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named on the 30th day of March, 1925, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hoch-

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stein, as co-partners doing business under the firm name and style of N. Latzko and A. Popper appellants and you are appellees to show cause, if any there be, why the order in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 2nd day of March, in the year of our Lord One thousand nine hundred and twenty-five, and of the Independence of the United States the One hundred and forty-ninth.

140

JOHN C. KNOX,
United States District Judge for the Southern District of New York, in the Second Circuit.

Stipulation re Appeal Bond.

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It is stipulated that the bond required by the order, allowing the appeal herein, was duly given, approved and filed, and that such bond and approval need not be printed.

Dated, New York, March 23, 1925.

BRODEK & RAPHAEL,
Solicitors for Petitioners-Appellants.

ROSENBERG & BALL,
Solicitors for Trustee-Appellee.

142 **Stipulation as to Record.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R.
143 HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as copartners doing business under the firm
144 name and style of N. LATZKO and A. POPPER,

Petitioners-Appellants.

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record in said District Court in the above entitled matter, as agreed upon by the parties.

Dated, New York, March 23, 1925.

BRODEK & RAPHAEL,
Solicitors for Petitioners-Appellants.

ROSENBERG & BALL,
Solicitors for Trustee-Appellee.

Clerk's Certificate. 145

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as copartners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, 146

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as copartners doing business under the firm name and style of N. LATZKO and A. POPPER, 147

Petitioners-Appellants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the rec-

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ord of the said District Court in the above entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 31st day of ~~April~~ March in the year of our Lord one thousand nine hundred and twenty-five and of the Independence of the said United States the one hundred and forty-ninth.

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ALEXANDER GILCHRIST, JR.,
Clerk.

150

Petitioners' Exhibit No. 3. 151

June 16, 1923.

American Exchange National Bank,
128 Broadway,
N. Y. City.

Dear Sirs:

By an order made June 15, 1923, by the United States District Court, Southern District of New York (Hon. John C. Knox, U. S. District Judge), I have been appointed Receiver of the partnership 152
or firm, of Knauth, Nachod & Kuhne, and my bond in the sum of $50,000 has been approved this morning and duly filed in the Clerk's office of said Court.

You will please take notice that by the terms of the order of my appointment, copy of which will be forwarded to you as soon as the order has been printed, I am directed to take possession of all the property of every kind of the alleged Bankrupts, and that all persons, firms and corporations are directed forthwith to deliver to said Receiver all money and property of the Bankrupts now in their possession. 153

You will, please, therefore, not pay any checks drawn against the account of this firm which come into your Bank either by presentation direct or through the Clearing House and hold the funds which were on deposit at the opening of business on June 16th, for my account and until further notice from me.

Yours very truly,

M. S. BORLAND,
Receiver.

MSB/M

154 **Petitioners' Exhibit No. 4.**

June 22, 1923.

American Exchange National Bank,
128 Broadway,
City.

Dear Sirs:

Confirming conversation which our Mr. Newton had with your Mr. Haig, I herewith notify you my approval of the sale to Messrs. Farr & Co., of 100 shares Fajardo Sugar stock at 110 per share.

155 Kindly credit the proceeds on account of the loan of which this stock is part collateral, and oblige

Yours very truly,

M. S. BORLAND,
Receiver.

Petitioners' Exhibit No. 7.

AMERICAN EXCHANGE NATIONAL BANK

June 25, 1923.

156 Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
City.

Dear Sir:

We beg to advise that we are holding a Call Loan of Knauth, Nachod & Kuhne for $250,000 dated April 27, 1921, and we hereby make a demand for payment of same.

Yours very truly,

CLINKEN BROOMER,
Assistant Cashier.

Petitioners' Exhibit No. 8. 157

AMERICAN EXCHANGE NATIONAL BANK

June 25, 1923.

Receiver, Knauth, Nachod & Kuhne,
120 Broadway,
New York City.

Attention: Mr. S. RICHARDSON.

Dear Sir: 158

We are enclosing herewith our statement of the account of Knauth, Nachod & Kuhne, together with cancelled vouchers, which shows a balance due you of $212,127.86.

You are indebted to us for a loan of $250,000.

We sold on Saturday 100 shs Fajardo Sugar at 110. We understand that the proceeds of the above are to be placed to your account tomorrow, less commission charges and revenue stamps for $22.40.

Trusting that you will find this statement correct, we beg to remain

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Yours very truly,

CHARLES V. A. WALSH,
Auditor.

160 **Petitioners' Exhibit No. 5.**

June 26, 1923.

American Exchange National Bank,
128 Broadway,
N. Y. City.

Dear Sirs:

In accordance with conversation which Mr. Newton of this office had with your Mr. Haig, I herewith confirm my approval of the sale of 500 shares
161 Mexican Seaboard Voting Trust Certificate. $3,000 N. Y. Central 7s due 1935,
at the market, and will thank you to notify me when such sales have been made.

Kindly credit the proceeds on account of the loan of which the stock is part collateral, notifying me of the amount realized and oblige

Yours very truly,

M. S. BORLAND,
Receiver.

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162 **Petitioners' Exhibit No. 9.**

AMERICAN EXCHANGE NATIONAL BANK

June 26, 1923.

Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
City.

Dear Sir:

Referring to your letter of the 22nd, we have sold to Farr & Co., 100 shares Fajardo Sugar at

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110, netting $10,996, which amount we have applied in reduction of loan of Knauth, Nachod & Kuhne dated April 27, 1921, leaving balance due of $239,004.

We have charged the account of Knauth, Nachod & Kuhne $22.40 to cover transfer stamps on transfer of 560 shares of Fajardo Sugar stock to our nominee to make same negotiable.

Yours very truly,

W. J. CLINKENBROOMER,
Cashier.

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Petitioners' Exhibit No. 10.

AMERICAN EXCHANGE NATIONAL BANK

June 27, 1923.

Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
City.

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Dear Sir:

Referring to your letter of the 26th, we have sold $3,000 New York Central convertible 6% bonds of 1935 netting $3,146, as per statements enclosed ($1,000 at 104 and $2,000 at 104⅛). We have applied this amount in reduction of loan Knauth, Nachod & Kuhne, dated April 27, 1921, leaving balance due of $235,858.

We are today charging the account of Knauth, Nachod & Kuhne $40 to cover revenue stamps ac-

166 count transfer of 1000 shares Mexican Seaboard Oil Voting Trust certificate to the name of our nominee.

Yours very truly,

W. J. CLINKENBROOMER,
Cashier.

Petitioners' Exhibit No. 11.

167 AMERICAN EXCHANGE NATIONAL BANK

June 28, 1923.

Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
N. Y. City.

Dear Sir:

168 Referring to your letter of the 26th, we have sold 500 shares Mexican Seaboard Oil Voting Trust Certificates to net $6,355 (200 at 12¾, 300 at 13), as per statements enclosed. We have applied this amount in reduction of loan Knauth, Nachod & Kuhne dated April 27, 1921, leaving balance due of $229,503.

Yours very truly,

CLINKENBROOMER,
Assistant Cashier.

Petitioners' Exhibit No. 12. 169

AMERICAN EXCHANGE NATIONAL BANK
128 Broadway
New York

July 12, 1923.

Mr. M. S. Borland,
Receiver for Knauth, Nachod & Kuhne,
120 Broadway,
New York City.

Dear Sir: 170

We acknowledge receipt of your favor of the 12th inclosing check for $18,851.83.

In accordance with your instructions we are today charging the account of Knauth, Nachod & Kuhne $212,066.16 (balance of account) and applying same with the above mentioned check to retire loan of Knauth, Nachod & Kuhne April 17, 1921, which balance, $229,503 and interest to date $1,414.99 as per enclosed statement.

We have today handed your representative the balance of the securities held against the above loan. Letters covering sale of securities have already been forwarded to you. 171

Thanking you, we are

Yours very truly

CLINKENBROOMER,
Assistant Cashier.

172 **Petitioners' Exhibit No. 6.**

July 12, 1923.

American Exchange National Bank,
128 Broadway,
N. Y. City.

ATTENTION: Mr. W. G. CLINKENBROOMER

Dear Sir:

Enclosed herewith please find my check for
173 $18,851.83 in liquidation of Call Loan of April 22, 1923, for $250,000. Will you please deliver to bearer the following unsold securities:

SECURITIES UNSOLD.

STOCKS.

100 Shares Mhtn. Ry. Guar.
550 shares Cent. Ag. Sug.
500 Mex. Seaboard V. T. Ctf.
500 Southern Pacific
100 Reading
174 1500 T. C. Oil
200 Nat. Cl. & Suit
1200 Ray Copper
100 Underwood Type
460 Fajardo Sugar
200 North Pac.
400 Tenn. Copper & Chem.
200 Cot. Oil pfd.
50 Steel Com.
100 Hudson Motor

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BONDS.

$40,000 Erie 4/53
16,000 Rio de Janeiro 8/47
10,000 Rio de Janeiro 8/46
10,000 St. Paul 4½/2014
8,000 Frisco Inc. 6/60
5,000 Ches. & Ohio 5/46

Yours very truly,

M. S. BORLAND,
As Receiver of Knauth, Nachod & Kuhne.

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Clerk's Certificate.

United States of America,
Southern District of New York, } ss.:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District District of New York, do hereby Certify that the Writings annexed to this Certificate have been compared by me with their originals on file and remaining of record in my office, that they are correct transcripts therefrom and of the whole of the said originals.

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IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court at the City of New York, in the Southern District of New York, this 17th day of March in the year of our Lord One Thousand Nine Hundred and Twenty-six, and of the Independence of the said United States the One Hundred and Fiftieth.

ALEX. GILCHRIST, JR.,
(Seal) Clerk.

178 **Stipulation re Exhibits.**

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH
179 and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO
180 and A. POPPER,
Petitioners-Appellants,

MIDDLETON S. BORLAND,
Trustee-Appellee.

IT IS HEREBY STIPULATED between the parties to the above entitled action through their respective attorneys that the record of the above cause to be used on certiorari proceedings from, and the appeal to the United States Supreme Court shall include Petitioners' Exhibits 3, 4, 5, 6, 7, 8

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9, 10, 11, and 12, and the order of the above court dated February 2, 1926, pursuant to the provision of the Equity Rule No. 76.

Dated, New York, February 26th, 1926.

BRODEK & RAPHAEL,
Attorneys for Appellants.

ROSENBERG & BALL,
Attorneys for Appellee.

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184 **Opinion of Circuit Court.**

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

In the Matter
of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN
185 R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm
186 name and style of N. LATZKO and A. POPPER,
Petitioners-Appellants,

MIDDLETON S. BORLAND,
Trustee-Appellee.

Before—ROGERS, MANTON and HAND,
Circuit Judges.

BRODEK & RAPHAEL, for Petitioners-Appellants; Charles A. Brodek, Borris M. Komar, of Counsel.

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ROSENBERG & BALL, for Trustee-Appellee; George G. Ernst, Ralph F. Colin, of Counsel.

KELLOGG, EMERY, INNESS-BROWN & CUTHELL; Henry G. Hotchkiss, of Counsel.

Appearing as Amici Curiae.

This cause comes here from the United States District Court for the Southern District of New York.

The facts are stated in the opinion.

Rogers, Circuit Judge. This is an appeal from an order dismissing a reclamation claim of copart- 188
ners doing business as international bankers and maintaining a banking house in the City of Budapest, Hungary under the firm name of N. Latzko & A. Popper. And on appeals in such a proceeding this court reviews both findings of fact and conclusions of law.

On June 15, 1923, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York praying that the firm of Knauth, Nachod & Kuhne be adjudged bankrupt and they are hereinafter referred to as the bankrupts.

A temporary receiver was appointed and quali- 189
fied and the receivership was extended for each individual member of the copartnership, and the receiver entered into possession of the property of the alleged bankrupts.

The bankrupts were engaged in business as international bankers and maintained a banking house in the City of New York. They acted as the New York correspondents of the Budapest banking house of N. Latzko & A. Popper, the petitioners.

The nature of the dealings between the two banking houses involved the transmission of funds by

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the Budapest house to the New York house, or the delivery by the Budapest house to the New York house of evidences of debt which were collected by the latter and placed to the credit of the former, from which account payments were made from time to time by the New York house upon order or request of the Budapest house.

There was no express agreement that evidences of debt, so forwarded to the bankrupts, were to be credited upon their receipt and before collection as a deposit of cash. Neither was there an express
191 agreement that upon the receipt of such evidences of debt by the New York house the Budapest house should have the right to draw against the fund prior to its collection. But there was no agreement that the Budapest firm could not draw against such evidences of debt before their collection. They simply did not as a matter of fact do it. The allegations in the petition make this clear and are found in the margin.[1]

In the determination of the questions which are involved it is important to keep in mind the date on which the trustee of a bankrupt's estate be-
192 comes vested with the title to the estate.

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[1] "Fifth.—That petitioners had no agreement with said K. N. & K. (the bankrupts) to treat evidences of debt deposited with said K. N. & K. for collection or otherwise, as a deposit of cash, nor that an immediate credit should be given by said K. N. & K. to petitioners upon the receipt of such evidences of debt.

Sixth.—That petitioners did not treat evidences of debt deposited with said K. N. & K. for collection or otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K. N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K. N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K. N. & K."

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Section 70a of the Bankruptcy Act provides that "The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * *."

And Remington on Bankruptcy (3rd ed.), vol. 3, sec. 1191 states that the above section of the Bankruptcy Act vests all the property in the 194
trustee, which prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

In Everett v. Judson, 228 U. S., 474, 479, the court said:

> "We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the
> time of adjudication is that which the bank- 195
> rupt owned at the time of the filing of the petition."

And this doctrine is reasserted in White v. Stump, 266 U. S., 310, 313. In the case last cited, referring to the date when the petition is filed, the court said:

> "The bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt.'"

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The Petition for Reclamation in this case alleged that the involuntary petition in bankruptcy was filed on June 15, 1923, at 10:30 P. M. with the District Judge, and that on the same day the temporary receiver was appointed, and that on June 16th he duly qualified, filed his official bond and entered into possession of the property of the alleged bankrupts. It then alleges that on June 16, 1923, at 9:30 A. M. the involuntary petition in bankruptcy was duly filed in the office of the Clerk of the District Court. The receiver filed an answer
197 to the petition in which he denied various allegations contained therein, but he did not deny the allegation that the petition in bankruptcy was filed in the Clerk's office on June 16, 1923, at 9:30 A. M.

At the hearing on the Reclamation Petition before the Special Master the attorneys for the claimant and those for the trustee for the bankrupts stipulated certain matters and "agreed that throughout the petition the reference to 'the day said petition in bankruptcy was filed against said K. N. & K.,' or any similar allegation, shall mean only 'June 15, 1923' (this refers particularly to
198 paragraphs Eighth, Ninth, Tenth, Eleventh and Thirteenth)."

The paragraphs thus referred to are those which contain the allegations as to the time when the three checks herein involved were delivered, credited and collected and that when the petitioners caused the checks to be delivered to the bankrupts for collection and deposited to the petitioners' account they did not know of the bankrupts' insolvency, and also that when they caused the checks to be delivered to the bankrupts they had a credit balance with the said bankrupts amounting to several thousand dollars and were not then and

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have not been at any time since indebted to the bankrupts or to the receiver.

This stipulation as to the meaning of "the day said petition in bankruptcy was filed" cannot have the effect of a determination binding upon this court upon the question of the time when the petition was legally filed so as to determine the rights of the parties as affected thereby. Neither do we understand that the parties meant anything more than that the court should understand that the allegations in so far as they refer to the occurrence of an act on the day when the petition was filed 200
the allegation referred to June 15, 1923. And we hold that the petition was filed not on June 15th, when it was presented at 10:30 P. M. to the District Judge, but on June 16, at 9:30 A. M. when it was filed in the Clerk's office.

The word "filed" has not been defined by Congress. It has, however, a well defined meaning. It signifies the delivery into the actual custody of the proper officer designated by the statute, and whose duty it is to keep the records of the court. It carries with it the idea of permanent preservation of the thing as a public record. A paper is not filed by 201
presenting it to the judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the Clerk of the court for the purpose of making it a part of the records of the case. See United States v. Lombardo, 241 U. S., 73, 76; Laser Grain Co. v. United States, 250 Fed., 826, 831; Emmons v. Marbelite Plaster Co., 193 Fed., 181; In re Von Borcke, 94 Fed., 352.

In the case under consideration the claim is based upon three checks:

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1. A cashier's check of the Irving Bank-Columbia Trust Company, dated June 14, 1923, for $3,000.

2. A cashier's check of the National City Bank of New York, dated June 15, 1923, for $1,294.

3. A check of Goldman, Sachs & Co., dated June 15, 1923, drawn on the Bank of America for $15,000.

We shall consider them in the order named.

203 The Three thousand Dollar check. This check may be found in the margin.[1] The check did not indicate on its face that it was for the account of the petitioners. But the bankrupts on June 14th, the day the check was dated and the day on which the bankrupts received it, gave to the Irving Bank-Columbia Trust Company a receipt in which they stated the check was received "for account of N. Latzko & A. Popper, Budapest." The Special Master held this indicated that the bankrupts undertook to collect the check as an agent for Latzko and Popper. He held that the proceeds, when collected, would have been the property of

204 the Budapest house were it not for the allegation in the petition that the *petitioners caused* the

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[1] "Treasurer's Check. No. K10217
New York, 6/14/23.
IRVING BANK-COLUMBIA TRUST COMPANY
Woolworth Building
Pay to the Order of Knauth, Nachod & Kuhne, New York City, $3,000.00 Three thousand and 00/100—not over Three thousand ($3,000) Dollars through New York Clearing House
Countersigned:
F. J. MORAN.
G. W. Bugel,
Treasurer."

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Irving Bank-Columbia Trust Company, who drew the check, to deposit it for the account of the petitioners with the bankrupts. He thought therefore that when the check was so deposited and credited and collected all prior to the filing of the petition in bankruptcy, the bankrupts had become debtors to the petitioners, and the proceeds of the check amounted to a debt due from the bankrupts to them.

This check was credited by the bankrupts to the claimants' account on June 14, 1923, the day before the petition in bankruptcy was presented. And 206
on the same day that the bankrupts credited the check to the claimants' account they indorsed the check to the American Exchange National Bank, and that bank on the same day credited the bankrupts with the amount of the check. The check was collected by the American Exchange National Bank through the New York Clearing House on June 15, 1923. This was the day the petition in bankruptcy was presented to the District Judge—though prior to the filing of the petition.

The District Judge in his opinion confirming the Special Master's report, states that this check was 207
collected the day the petition in bankruptcy was filed, and then goes on to say:

> "The proceeds of the first check clearly became part of the assets of the bankrupts prior to the hour when the petition was filed. I can see no reason for invoking the rule that the law will take no account of the fractions of a day to defeat the bankrupts' title. It would be as tenable to hold that two lis pendens filed at different hours on the same day imposed an identical lien. The claimant cannot pre-

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vail as to the first check and the master's report as to it should be confirmed."

We fully agree that the law will take no account of the fractions of a day to defeat the bankrupts' title. It is true that for some purposes fractions of a day are not recognized in law. Louisville v. Portsmouth Savings Bank, 104 U. S., 469; McGill v. United States Bank, 12 Wheat., 511. But the rule that a day is an indivisible period of time is a mere legal fiction, which is subject to numerous
209 exceptions. And one of them is that the courts will disregard the fiction as where it is necessary to protect a completed act or save a vested right, or to determine the conflicting rights of rival claimants when they depend upon priority in fact (Johnson v. Smith, 2 Burr, 950; Cincinnati First National Bank v. Burkhardt, 100 U. S., 686; Westbrook Mfg. Co. v. Grant, 60 Me., 88; Hoyt v. San Francisco &c., R. Co., 87 Cal., 610; Jackson Brewing Co. v. Wagner, 117 La. Ann., 875; Johnson v. Pennington, 15 N. J. L., 188; Brainard v. Bushnell, 11 Conn., 16; Neale v. Utz, 75 Va., 480).

But we do not agree with the District Judge as
210 respects this check that it was actually paid on the morning of June 15th and prior to the filing on the same day, but at a later hour, of the petition in bankruptcy. That petition, for reasons already stated, was not "filed" on June 15th when it was presented to the District Judge but on June 16th when it was deposited in the Clerk's office. Inasmuch as prior to that time the amount of the check had been credited to the petitioners in their account with the bankrupts, and to the bankrupts in their account with the American Exchange National Bank, the amount of the check had been

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actually collected. The bankrupts accordingly had become debtors to the petitioners prior to the filing of the petition in bankruptcy and the amount of the check was a part of the estate which on June 16, 1923, passed to the receiver of the estate of the bankrupts.

But there is another reason for reaching the same conclusion. The deposit of this check with the bankrupts who were conducting a banking business, although made by the Irving Bank-Columbia Trust Company, was made by it as the agent of the petitioners and deposited under their instructions. It was therefore in effect as though deposited by the petitioners themselves. If it had been in fact deposited by them to be credited in their account, and the bankrupts indorsed it and credited it in their account the bankrupts, when so crediting it, would have made themselves at that time debtors in that amount to the petitioners, as no agreement is shown that the petitioners had no right to draw on checks deposited to their credit in their regular checking account until collection was actually made.

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In Foley v. Hill, 2 Cl. & Fin., 28, in the House of Lords, the effect of a deposit in a bank was fully discussed by Lords Cottenham, Brougham and Lyndhurst. They concurred in the opinion that the relation between a banker and customer, who pays money into a bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor. And in Bank of the Republic v. Millard, 10 Wall., 152, 155, the Supreme Court, in 1869, declared:

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> "It is no longer an open question in this court, since the decision in the cases of The

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Marine Bank v. The Fulton Bank, 2 Wall., 252, and of Thompson v. Riggs, 5 Wall., 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor."

In St. Louis & S. F. Ry. Co. v. Johnston, 27 Fed., 243, A, who had an account in B bank in New York, deposited in the bank a sight draft drawn by him on a corporation in Boston. The bank credited him with the amount of the draft as a
215 cash deposit. The bank was insolvent at the time but it forwarded the draft to its collection agent at Boston and it was paid after the bank had failed and closed its doors. Judge Wallace, sitting in the Circuit Court for the Southern District of New York, held that the draft was not the property of A when paid by the drawee and that he was not entitled to recover the amount thereof from the receiver. He said: "When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper just as a like credit is given for the rest of the deposit, the act evinces unequivo-
216 cally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper."

In Burton v. United States, 196 U. S., 283, certain checks on a bank in St. Louis were sent from that city to the payee, in Washington. The payee on receiving them indorsed them and deposited them in a bank in Washington and were immediately credited in the payee's account. The checks were afterwards paid in due course by the St. Louis

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bank. The court held that the Washington bank acquired the title to the checks when the deposit was made and credited in the depositor's account. The court said:

> "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal

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effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defend-
221 ant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank (the bank of deposit) was its owner when sent."

The trial Judge in the Burton case had instructed that the effect of the deposit of the checks in the Washington bank depended upon the understanding and intent of the bank and the depositor. That if the intent and understanding was that the bank should become the purchaser of the check and be the absolute owner thereof then the payment to the Washington bank amounted in law to
222 a payment to that bank and not to the depositor. But if the intent and understanding of the bank and the depositor was that the Washington bank should act as the agent of the depositor then the payment in St. Louis was in law a payment to the depositor. The Supreme Court held this was error, and that there was no foundation for submitting to the jury the question as to what the understanding of the parties was at the time the deposit was made. And this it held because the uncontradicted evidence showed that there was no agreement or understanding of any kind other than such as the law makes from the transaction detailed.

223

This court in In re Ruskay, 5 Fed. (2d) 143, 149, stated that where a check or draft is indorsed and deposited in a bank and is accepted as cash it at once becomes the property of the bank and the bank becomes the debtor of the depositor in the amount of the check so deposited with the superadded obligation that the money is to be paid when demanded by check. In the absence of special agreement to the contrary, or some notice to the contrary given to the depositor prior to or at the time of the deposit, such is the rule as to the effect of the transaction.

224

The New York Court of Appeals in Craigie v. Hadley, 99 N. Y., 133, laid down the law as follows:

> "The general doctrine, that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. The transaction, in legal effect, is a transfer of the money, or drafts, or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

225

The general rule is undoubted that checks deposited in a bank for collection remain the prop-

226 erty of the depositor (Clark Sparks & Sons Mule &c., Co. v. Americus National Bank, 230 Fed., 738; Richardson v. New Orleans Coffee Co., 102 Fed., 785; Philadelphia v. Eckels, 98 Fed., 485; Fifth National Bank v. Armstrong, 40 Fed., 46; Blair v. Hill, 165 N. Y., 672; Perth Amboy Gas Light Co. v. Middlesex County Bank, 60 N. J. Eq., 84; South Park Fidelity &c., Co. v. Chicago, Great Western R. Co., 75 Minn., 186).

In 7 C. J., 599, the law is stated as follows:

227 "One depositing paper in a bank may part with his title at the time of such deposit by a special agreement *or by an indorsement in blank;* and the general rule is that, where such paper is indorsed in blank, the first bank, or any other bank through which it may pass, indorsed in the same manner, acquires a legal title * * *."

It is our opinion that when the bankrupts received this check payable to their order without restriction and credited it in the petitioners' checking account, the relation of debtor and creditor
228 was thereby established on June 14, 1923. If not established then there can be no question but that it was established on June 15th when the check was collected. And as the petition in bankruptcy was not filed until June 16th there can be no doubt that the receiver in bankruptcy, and not the petitioners, was entitled to the proceeds of the $3,000 check.

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THE TWELVE HUNDRED AND NINETY-FOUR DOLLAR CHECK. This check may be found in the margin.[1]

The petitioners alleged in their petition that on June 15, 1923, they caused the National City Bank of New York to deliver to the bankrupts this check to be collected for the account of the petitioners, and that it was to be so collected appears on the face of the check itself. For the words "Favor N. Latzko and A. Popper, Budapest," seem to us, on the whole, not to differ in effect from "Collect for N. Latzko and A. Popper, Budapest." A check so 230
drawn cannot be said to be freely negotiable. Any payee to whom it was indorsed would take the proceeds when collected not for himself but for N. Latzko and A. Popper.

The bankrupt received the check on June 15, and on the same day they indorsed it in the manner disclosed in the margin.[2]

---

[1]"No. F. T. 261365 New York, June 15, 1923.
Cashier's Check
THE NATIONAL CITY BANK OF NEW YORK
Pay to the Order of
KNAUTH, NACHOD & KUHNE, New York—$1294.00 231
Favor N. LATZKO & A. POPPER, Budapest.....
One Thousand Two Hundred Ninety-four and 00/100 Dollars
Payable only through New York Clearing House
N. G. LENFESTEY,
Cashier.
J. W. ALLALE,
Asst. Cashier."

[2]"Pay to AMERICAN EXCHANGE
NATIONAL BANK
Or Order
June 15, 1923,
KNAUTH, NACHOD & KUHNE
New York, N. Y.
1-548 1-548"

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An examination of the check and the indorsement thereon disclosed to the American Exchange National Bank that it did not thereby acquire title to the check and that the proceeds did not belong to it or to the indorsers but to N. Latzko and A. Pepper. The nature of the transaction was not affected by the fact that the bankrupts when they received the check credited it on June 15th, in the account of the petitioners, or that the subsequent indorsee, the American Exchange National Bank when they received the check on June 15th at once
233 credited it in the account of the bankrupts. The bank did not receive the proceeds until June 16, and when they received it it was not as their money and not as the money of the bankrupts but as the money of N. Latzko and A. Pepper, the petitioners herein. The right of the petitioners to the proceeds of the check is not to be defeated by the fact that the bankrupts credited it in the petitioners' account before it was collected, or by the fact that the American Exchange Bank credited it in the indorsers' account. They might do so at their own risk but not at the risk of the petitioners. The pro-
234 ceeds of the check, whenever it was collected, belonged to N. Latzko and A. Pepper. And nothing the bankrupts could do prior to its collection could deprive them of their right to the fund.

In 1909, in Re v. Chillicothe Branch of State Bank, 15 F. C. Co., 154, Case No. 2,197, Mr. Justice McLean and the Supreme Court, sitting on Circuit Justice, had before him bills drawn by customers of a Chillicothe, Ohio, on Ellis Ludlow of New York, on order of the Ohio Life Insurance and Trust Company, payable to the order of the indorsee, indorsed "credit my account, Branch B. Bank, Chillicothe." The indorsement was held to be

restrictive and put an end to the negotiability of the bill. It was an appropriation of the proceeds of the note which rendered any other appropriation of them illegal. It was said that if a bill be restrictively indorsed a subsequent indorsee takes it upon the same trust that was devolved upon the first indorsee. "He is a mere agent and trustee for his principal, and whoever takes the money holds it under a similar trust."

In Bank of the Metropolis v. First National Bank of Jersey City, 19 Fed., 391, in the Circuit Court for the Southern District of New York, the plaintiff sent the checks to the Mechanics' National Bank of Newark, for collection, with the qualified endorsement, "For collection; pay to the order of G. L. Baldwin, cashier." The Newark Bank sent the checks for collection to the defendant. After the defendant received the checks the Newark Bank became insolvent. Judge Wallace held that the indorsement by plaintiff "for collection" was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds to another. He said: "As was held in Civil Bank v. Bank of Maryland, 22 Md., 148, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark Bank was merely its agent for collection."

In re Lowenbrooks, 209 Fed., 109, a depositor indorsed checks in blank and received credit for the same in his passbook. The bank contained a notice that "deposits of checks shall not be drawn against until collected." These checks were subjected to their own account in other banks and were in due time collected, but collection had not been made

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when the receiver in bankruptcy took possession of the banking house in which the original deposits were made. This court held that in the absence of the special agreement between the depositor and the bank the title to the checks would have passed to the bank, and the bank would have become merely a debtor to the depositor for the amount entered in the passbook. The question presented was whether a depositor who is credited with the face of checks which he has agreed not to draw against until they shall have been collected, has by
239 the act of deposit parted with the title to the checks so deposited. Under the circumstances stated this court thought that the course of business shown created the relation of principal and agent and was in effect the same as though the checks had been indorsed "For collection and deposit to the account of the depositors." The court pointed out that if prior to the bankruptcy proceeding the agency had been fulfilled by collection of the checks the moment the bank got the money on the checks the relation of debtor and creditor would have arisen.

In White v. Miners' National Bank, 102 U. S., 658, a draft was indorsed "Pay to A or order for
240 account of B." The court held that by the terms of the indorsement A became merely the agent of B for the collection of the money. The plaintiff relied on two propositions. The first of these is that words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorsee is liable in the usual manner, notwithstanding the words we have quoted. The other proposition is that such is the custom of bankers who deal

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in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract. Mr. Justice Miller, writing for the court, after stating the two propositions on which the plaintiff relied, said:

"We are not satisfied that either of these propositions is sound.

The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money.

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If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to controllict it.

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But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case. For assuming this to be correct, we think the plaintiff was still entitled to recover more than he did."

The legal effect of the transaction was merely to enable White to collect the money for the bank of

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it was held that where A, the payee of a check, indorses it to B "for account of A" B does not get title to the check but is merely the agent to collect it for A's benefit. It is our understanding that if A deposits a check in a bank in which he has a checking account, and endorses it for his account, and the bank credits it to his account, the title to the check passes to the bank and it becomes a debtor to the depositor for the amount thereof.

At the argument emphasis was placed upon the allegation made by petitioners in their petition that
245 they caused this check to be delivered by the National City Bank to the bankrupts, and we were told that the effect of the transaction must therefore be the same as though this check had been brought in by the petitioners. And that if the petitioners had brought it in and the bankrupts had at once placed it to the credit of the petitioners the relation of debtor and creditor would then and there have been established between them. It may be true that if petitioners had presented the check for collection and it was agreed between them and the bankrupts that it was to be credited before collection, such would have been the effect of the
246 transaction. But there was no such agreement made between them or on their behalf.

It is our opinion that the words on this check "Favor N. Latzko and A. Popper, Budapest" restricted the payee's power over the check. The words were equivalent to an indorsement for collection. A check made payable to a payee in favor of another is not freely negotiable and the payee holds it as an agent until he has collected and credited it. As this check was not collected until June 16, 1923, "during banking hours," we think the money collected on the check was the property of the petitioners at the time the petition in bank-

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ruptcy was filed on the morning of that day at 9:30 A. M., and therefore did not pass to the Receiver in Bankruptcy.

THE FIFTEEN THOUSAND DOLLAR CHECK. This check may be found in the margin.[1]

The petitioners alleged in their petition that on June 15, 1923, they caused Goldman, Sachs and Company to deliver to the bankrupts this check "to be collected" by the latter for the account of the petitioners. This allegation was in terms similar to that made respecting the $1274 check above considered. But the check which was introduced in evidence differs from that check in that it does not disclose that it was to be collected for the petitioners.

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At the time this check was delivered to the bankrupts they accompanied it with a letter explaining it was for account of petitioners. The letter is in the margin.[2]

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[1] GOLDMAN, SACHS & CO.

No. 69679 New York, June 15, 1923.

THE BANK OF AMERICA

Pay to the Order of

249

KNAUTH, NACHOD & KUHNE $15,000

Fifteen Thousand Dollars.

Passed
FWV

J. M. HUMPHREY.

[2] New York, June 15, 1923.

Knauth, Nachod & Kuhne
New York.

We hand you herewith our check for Fifteen Thousand ..... Dollars for account of Landeggen, Budapest, by order of Julius Baer & Co., Zurich, to pay cable, June 15, from same.

Please sign the attached receipt and return to bearer. $15,000.

GOLDMAN, SACHS & CO.

250

On receipt of the check, on June 15th, the day prior to the filing of the petition in bankruptcy, the bankrupts credited it to the account of the petitioners. They on the same day indorsed the check "Pay to American Exchange National Bank or order," and delivered it to that bank. And that bank also on the same day credited the bankrupts with the amount of the check in the bankrupts' account. But the check was not actually collected until the following day "during banking hours." The petitioners state in their petition that this col-

251 lection was made after the petition in bankruptcy was filed, but as they also allege that the petition was filed on June 15, and the facts show that it was not filed until June 16th, we do not know whether collection was actually made before or after the filing of the petition. And in the view we take of the matter it is unimportant whether collection was made on June 16th prior to the hour when the petition in bankruptcy was filed or on a later hour on the same day.

The important fact is that this $15,000 check is on its face a straight unrestricted cashier's check

252 payable to the order of the bankrupts. The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners. This they did as the agents of the petitioners. The legal effect of the transaction was the same as though the petitioners had themselves deposited the check "for our account" with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the

check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account. That transaction made the American Exchange National Bank the owner of the check on June 15th and the proceeds when collected on June 16th belonged not to the petitioners or to the bankrupts but to the bank which was the owner of the check when it was collected. We think the transaction is governed by the rule laid down in the Burton case, and that the relation between the petitioners and the bankrupts on June 15th, when this check was credited by the latter to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners. The finding of the court below, as to this check, was not erroneous.

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The authorities cited in what we have said respecting the check for $3,000 are equally applicable to this check for $15,000.

Before concluding this opinion we may remark that while the petitioners alleged in their petition that at the time the bankrupts accepted the checks and deposited them they knew full well that they were insolvent and unable to meet their obligations, and that they knew of the preparation of the original involuntary petition in bankruptcy filed against them.

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It was also alleged that at the time the checks were delivered to them the bankrupts wrongfully, fraudulently and with intent to defraud the petitioners held themselves out as a solvent and solid banking house whereas they were insolvent and unable to pay their debts.

The answer interposed by the trustee denied any knowledge or information sufficient to form a be-

256 lief as to the allegation. This was not an admission of the truth of the petitioners' allegation and was sufficient to put the petitioners to their proof (1 Encyc. of Pl. & Pr., 947; Federal Equity Practice, vol. 1, sec. 726).

If the bankrupts knew they were hopelessly insolvent and could not go on when they received the checks, and credited the same in the accounts of the petitioners, they acted fraudulently in doing what they did and the petitioners would be entitled to rescind the transactions involved and the bank-
257 rupts would hold as trustees ex maleficio subject to the petitioners' right of reclamation (St. Louis & San Francisco Railway Company v. Johnston, 133 U. S., 566). The mere fact of insolvency is not enough. The insolvency must be of such a character that it was manifestly impossible for the bankers to continue in business and meet their obligations and that fact must have been known to them when they accepted the deposits (Fidelity & Deposit Co. v. Kelso State Bank, 287 Fed., 828, 830; Quin v. Earle, 95 Fed., 728). But the burden was on the petitioners to show these facts and this they have not done. The record does not disclose
258 that any evidence was introduced before the Special Master in support of the allegations that the bankrupts knew they were insolvent and could not go on when they received the checks and credited them in the petitioners' account.

The decree is affirmed as to the checks for $3,000 and $15,000, and is reversed as to the check for $1,294.

Petition for Partial Rehearing. 259

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

In the Matter
of
OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, 260
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER, 261
Petitioners-Appellants,

MIDDLETON S. BORLAND,
Trustee-Appellee.

TO THE HONORABLE CIRCUIT JUDGES OF THE SECOND CIRCUIT:

The petition of ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business un-

262 der the firm name and style of N. LATZKO and A. POPPER, appellants, showeth unto your Honors that, being aggrieved by a part of the decision rendered in this cause on the 7th day of December, 1925, by which your petitioners were found to be entitled to the proceeds of a certain check for $1,294, drawn to the order of Knauth, Nachod & Kuhne, bankrupts, by the National City Bank of New York for the account of your petitioners, and were found to be not entitled to the proceeds of certain checks for $3,000, drawn to the order of
263 the said bankrupts by the Irving National Bank-Columbia Trust Company for the account of your petitioners, and for $15,000 drawn to the order of the said bankrupts by Goldman, Sachs & Company, and accompanied by instructions from said Goldman, Sachs & Company to the said bankrupts, that said check was delivered to them and constituted a payment to them for the account of your petitioners;

AND your petitioners' particular and only present grievance being that part of said decision which held that your petitioners were not entitled to the
264 proceeds of said check for $15,000.

NOW your petitioners respectfully state that the grounds of their said grievance are as follows:

(a) That although this court held in its said decision that neither said bankrupts nor their trustee ever had title to the proceeds of the said check for $15,000, your Honors did not award the proceeds of said check for $15,000 to your petitioners.

(b) That the delivery of the check for $15,000 by said bankrupts to the American Exchange National Bank, although it might have constituted the

American Exchange National Bank the owner of said check as between it and the said bankrupts, did not divest the title of your petitioners to the proceeds thereof paid by the American Exchange National Bank to the trustee for said bankrupts; 265

(c) That the fact that the American Exchange National Bank might have acquired title to the proceeds of said check for $15,000 is immaterial for the determination of the said appeal, as the American Exchange National Bank did not retain the said proceeds, but paid them to the trustee for the said bankrupts, thereby unjustly enriching 266 the estate of the bankrupts by $15,000, the property of your petitioners.

(d) That the fact that the American Exchange National Bank might have acquired ownership to said check for $15,000, as aforesaid, did not affect the right of your petitioners to claim the proceeds of said check from the trustee of said bankrupts in a reclamation proceeding between them and the said trustee, since the said trustee has no better title to the proceeds of said check for $15,000 than said bankrupts had, and the said trustee does not stand in the shoes of the American Exchange National Bank; 267

(e) That, as between your petitioners on one hand, and the said bankrupts and their trustee on the other, the said bankrupts had complete notice that said check for $15,000 was delivered to them for collection by reason of the written instructions accompanying said check;

(f) That the effect of restrictive instructions in regard to negotiable instruments is identical, irrespective of the fact whether the same are written on the negotiable instruments themselves or are contained in writings accompanying the same, in

268 so far as the persons, having notice thereof, as is the case with the bankrupts herein, are concerned;

(g) That your petitioners completely fulfilled the burden of tracing the proceeds of the said check for $15,000 into the hands of the trustee for the said bankrupts.

(h) That upon the principles applied by this court in its said decision in regard to the said check for $1,294, the title to the proceeds of said check for $15,000 was and is in your petitioners and not in the trustee for the said bankrupts.

269 That said questions of law were not argued on the hearing of said appeal, and your petitioners humbly pray for leave to reargue no other points of law except the above mentioned. That said points of law became important for the just and proper determination of the said appeal only as a result and because of the said decision of your Honors distinguishing the law applicable to the said check for $15,000 from the law applicable to the said check for $1,294.

270 WHEREFORE, your petitioners humbly pray that your Honors will grant a rehearing, humbly submitting to such orders as the court may make in the matter.

Dated, New York, the 18th day of December, 1925.

ALEXANDER LATZKO,
WILLIAM LATZKO,
CHARLES LATZKO,
SAMUEL POPPER,
EMIL HOCHSTEIN,
By BRODEK & RAPHAEL,
Attorneys-in-fact.

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I, CHARLES A. BRODEK, an attorney and counselor at law of the several courts of record in the State of New York, and of the above court, DO HEREBY CERTIFY that as one of the counsel for the petitioners named in the foregoing petition, I have examined the proceedings against them, and the opinion of the above court rendered on the 7th day of December, 1925, and carefully inquired into the matters set forth in their foregoing petition, and I believe the same are true.

Dated, New York, the 18th day of December, 1925. 272

CHARLES A. BRODEK,
Counsel for Petitioners.

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274 **Order Modifying Decision Below.**

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York on the 14th day of December, one thousand nine hundred and twenty-five.

Present—Hon. HENRY WADE ROGERS,
" MARTIN T. MANTON,
" LEARNED HAND, Circuit Judges.

275

In the Matter
of
OSCAR L. GUBELMAN, et al.,
Bankrupts,
ALEXANDER LATZKO, et al.,
Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

276 This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed as to the checks for $1,000, and $15,000 and is reversed as to the check for $1,294.00,

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.
M. T. M.

Order Denying Petition for Rehearing.

277

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 27th day of January, one thousand nine hundred and twenty-six.

278

Present—Hon. HENRY WADE ROGERS,
" MARTIN T. MANTON,
" LEARNED HAND, Circuit Judges.

In the Matter
of
OSCAR L. GUBELMAN, et al.,
Bankrupts,
ALEXANDER LATZKO, et al.,
Appellants.

279

A petition for a rehearing having been filed herein on behalf of the petitioners;

Upon consideration thereof it is

ORDERED that said petition be and hereby is denied.

H. W. R.
M. T. M.

280 **Clerk's Certificate.**

United States of America,
Southern District of New York, } ss.:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 80, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of

281 In the Matter of

Oscar L. Gubelman, et al.,
Bankrupts,

Alexander Latzko, et al.,
Appellants,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said court to be hereunto affixed, at
282 the City of New York, in the Southern District of New York, in the Second Circuit, this 2nd day of March in the year of our Lord one thousand nine hundred and twenty-six and of the Independence of the said United States the one hundred and fiftieth.

WM. PARKIN,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
APR 12 1926
WM. R. STANSBURY
CLERK

No. 1[redacted] 3[redacted] 48

Supreme Court of the United States

OCTOBER TERM, 1925.

In the Matter
of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER,

Petitioners-Appellants,

MIDDLETON S. BORLAND,

Trustee-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES A. BRODEK,
BORRIS M. KOMAR,
Counsel for Petitioners,
67 Wall Street,
New York City.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

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Supreme Court of the United States

OCTOBER TERM, 1925.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER,
Petitioners-Appellants,

MIDDLETON S. BORLAND,
Trustee-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hochstein, as copartners doing business under the firm name and style of N. Latzko and A. Popper, respectfully shows:

I.

Nature of Proceedings and Decision Below.

In the bankruptcy proceedings of Knauth, Nachod & Kuhne, petitioners filed a reclamation claim for $19,294, being the proceeds of three checks, for $1,294, for $3,000, and for $15,000, respectively, alleged to have been deposited with the bankrupts by three New York banks, and collected by still another New York bank (in which they had been redeposited by the bankrupts), subsequent to the filing of the involuntary petition in bankruptcy against the bankrupt. The proceeds of all of said three checks were duly traced by your petitioners into the possession of the trustee for the bankrupts.

Your petitioners are Hungarian bankers, who maintained a current account with the bankrupts. The three checks in question were delivered by New York banks to the bankrupts, with instructions, either stated on the face of the checks, or in accompanying memoranda, that said checks were delivered by the New York banks to the bankrupts "in favor of" or "for account of" your petitioners. The Circuit Court of Appeals for the Second Circuit held that these words were expressions restricting the negotiability of said checks, and constituted the bankrupts merely agents for the collection of said checks for the benefit of petitioners, the principals. The Circuit Court of Appeals accordingly allowed the reclamation claim of the petitioners as to the check for $1,294 on the ground that the words "in favor of" petitioners appeared on the face of the check, but disallowed the claim for $15,000 on the ground that the words "for account of" petitioners appeared only in the written instructions accompanying the delivery of the check while the check itself was non-restricted on its face.

The claim for $3,000 was also disallowed on the ground that in the opinion of the court said check was, as a mat-

ter of fact, collected prior to the filing of the petition in bankruptcy.

In applying to this Honorable Court for a writ of *certiorari*, petitioners desire to review only so much of the decision of the Circuit Court of Appeals as relates to the check for $15,000.

II.

Errors of the Circuit Court of Appeals.

In distinguishing between the checks for $1,294 and $15,000, the Circuit Court of Appeals, as your petitioners are advised, made a distinction which is both untenable in principle and contrary to an unbroken line of authorities, set forth in the brief of your petitioners:

1. The relationship between a bank and its depositors is a contractual one, determined in each particular transaction by the terms of the contract. It is elementary that the rules governing the construction of contracts apply to the rules governing the construction of negotiable instruments. It is also firmly established that in construing a contract, all the papers relating thereto are taken into consideration and that the intention of the parties thereto must be gathered from all the writings relating to the contract, executed simultaneously with the entry into same. The same rule governs the relationship between a bank and its customers, which springs up at the time negotiable instruments are delivered by a customer to the bank. Hence, as between your petitioners and the bankrupts, the written instructions of the New York bank, accompanying the check for $15,000, advising the bankrupts that the same is delivered to them merely "for account of" your petitioners constituted a part of the contract between the bankrupts and your petitioners in so far as said check for $15,000 was concerned. And the Circuit Court of Ap-

peals was in error when it refused to consider said instructions as part of the terms which governed the delivery to the bankrupts of said check for $15,000 and as indicating the intention on the part of the New York bank that prior to the collection of the proceeds of said check by the bankrupts, there should be a relationship of agent and principal between the bankrupts and your petitioners, and not that of creditor and debtor.

2. This Honorable Court, in the case of *White* v. *Miners' National Bank*, 102 U. S., 658, held that in construing an endorsement "Pay S. V. W. or order for account M. N. B.":

> "The language of the endorsement is *without ambiguity*, and *needs no explanation* either by parol proof or by resort to usage."

The record herein is barren of any facts whatsoever showing that the parties in question intended that the expression "for account of" as used by the New York bank in the memorandum accompanying the delivery of the check for $15,000 be used in any other sense than that implied to it by law. Consequently, we respectfully submit that, even apart from the fact that said expression was heretofore held by this Honorable Court to be a commercial expression, unambiguous in its meaning, and having settled legal import, the Circuit Court of Appeals had no facts before it upon which it could base its decision, holding, as it did, that the said words "for account of" in said memorandum did not have their settled legal import but were merely words indicating the manner of bookkeeping entry.

3. It has repeatedly been held that in interpreting technical words and expressions used in any particular branch of commerce, trade or finance, the meaning which is usually attributed to such words and expressions in

that particular branch of commerce, trade, or finance must be given to them. In this particular case, the instructions accompanying the check for $15,000 were written by a New York bank, presumed to be familiar with the banking and legal meaning of the technical words and expressions used in banking transactions. To impute to said bank, without a scintilla of evidence in support of said conjecture, that it used the expression "for account of" in the sense of a bookkeeping entry and not in the sense of a restriction upon negotiability of said check of $15,000, it is respectfully submitted, was a clear error on the part of said Circuit Court of Appeals, and this is still more so, because said expression, being unambiguous, cannot be varied or qualified either by parol evidence or by speculative inferences.

4. The expression "for account of" in connection with negotiable instruments is held to imply the relationship of principal and agent between the depositor and the bank, because it signifies that the proceeds of the negotiable instruments are to be held by the bank for the use of the depositor. "The plain meaning of which is that the acceptor of the draft is to pay to the indorsee, *for the use of the indorser.* The indorser is to receive it *on account of* the indorsee" (*White* v. *Miners National Bank, supra*). Whether the words "for account of" were used by the New York bank upon the face of said checks or in the accompanying memorandum, it is clear that the New York bank did not intend to pay the proceeds of said check to the bankrupts for their own use, *but for the use of your petitioners.* The transactions with all said checks took place in the City of New York. The New York Negotiable Instruments Law provides in Sections 35 and 66:

> "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. * * *,

the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, *and not for the purpose of transferring the property in the instrument.*"

"An indorsement is restrictive, which either: (3) Vests the title in the indorsee in trust for *or to the use of some other person.*"

Thus, either under the decision of this Honorable Court in *White* v. *Miners' National Bank, supra,* or pursuant to the terms of the New York Negotiable Instruments Law, it was error on the part of the Circuit Court of Appeals to hold that the relationship of debtor and creditor was created between the bankrupts and your petitioners, upon delivery by the New York bank of said check for $15,000 to the bankrupts with a memorandum attached to it stating that it was so delivered "for account of" your petitioners.

5. The Circuit Court of Appeals held in regard to said check for $15,000 that its "proceeds when collected on June 16th *belonged not to the petitioners or the bankrupts,* but to the bank which was the owner of the check when it was collected" (Record, fol. 253). This holding of the Circuit Court of Appeals is also deemed an error, since there are numerous decisions to the effect that when the bank of deposit fails to transmit the instructions given to it by the depositor (showing that the relationship between it and its depositor is that of principal and agent and not of debtor and creditor), the depositor, upon the bankruptcy of the bank of deposit, is entitled to follow the proceeds of the negotiable instruments, endorsed by him in blank, but deposited for collection, as aforesaid, into the assets of the collecting bank, providing the col-

lecting bank does not acquire superior equities thereto. In the case at bar, not only the collecting bank did not claim or acquire any equities upon the proceeds of said check, but the trustee for the bankrupts actually used said proceeds to pay off the indebtedness of the bankrupt to said collecting bank and received from said collecting bank pledged securities of the bankrupts, the market value whereof was far in excess of the amount of said loan. It is submitted, that your petitioners, having completely traced their trust funds into specific fund forming part of the estate of the bankrupts herein, are entitled to reclaim the same as preferred *cestuis que trust.*

III.

Important Questions of Commercial Law are Involved.

The questions of law presented upon this application for a writ of *certiorari* are of vital and outstanding importance to the large mass of bank depositors, individual and corporate, throughout the country, and also to the banking community at large. They are questions of general commercial law upon which uniformity of decisions is essential, particularly as they concern every day practice, involving numberless transactions of the same type.

In so far as the Circuit Court of Appeals held that it is entitled to construe the expression "for account of" in a sense otherwise than that attributed to it generally in the banking transactions, the decision certainly conflicted with the clear decision of this Honorable Court in *White* v. *Miners' National Bank, supra,* holding that such expression was unambiguous and could not be varied by parol evidence. Still less could it be varied by mere inference, without any basis of fact in the record.

Of still greater importance is the second question involved in this case, to wit, the clear holding of the Circuit Court of Appeals that in construing the relationship be-

tween the depositor and the bank, it will merely consider the negotiable instrument itself and not the memorandum accompanying it. This conclusion of the Circuit Court of Appeals is not supported by citation of any Federal authority. In fact, in this respect, the decision of the Circuit Court of Appeals is of first impression. In *Boone County National Bank* v. *Latimer,* 67 Fed., 27, the court apparently assumed the contrary doctrine, but did not enunciate it in its opinion. On the other hand, the decision of the Circuit Court of Appeals in the case at bar is contrary to the decisions of the Court of Appeals of Kentucky, the Court of Civil Appeals of Texas, Supreme Court of Alabama, the Court of Appeals of New York and other courts of appellate jurisdiction. Your petitioners feel that if, in respect to the construction of the memorandum accompanying delivery of a negotiable instrument by a depositor to his bank, the Federal rule is to be different from the rule in force in practically every state jurisdiction throughout the country, it should have the authority of your Honorable Court. On this point the Circuit Court of Appeals came in direct conflict with the decision of the Court of Appeals of New York (*Bank of America* v. *Waydell,* 187 N. Y., 115, 120). Even assuming that the decision of the Circuit Court of Appeals for the Second Circuit would not be accepted in the other circuits, it will have to be considered as ruling law in its own circuit, covering, as it does, the district wherein most of the nation's banking business is conducted. The evil of having two rules, one Federal and one State, on such an important and frequent question of commercial and banking law, is too apparent to require further argument.

Finally, in so far as the Circuit Court of Appeals decided that the depositor, who delivers a negotiable instrument signed in blank but with instructions constituting in regard to the deposit between him and his bank, the relationship of principal and agent, is deprived of the benefit of such instructions when his bank, contrary

thereto, omits to transmit said instructions to its corresponding bank which actually collects the proceeds thereof, it came into conflict in principle with its own previous decision to the contrary in *Re Berry* (147 Fed., 208). In the *Berry* case, a firm of stockbrokers, through an error of fact, paid to another firm of stockbrokers $1,500. Three days later an involuntary petition in bankruptcy was filed against the payees. Said sum of $1,500 was paid by two checks, which payees deposited at once with their bank, and subsequent thereto a balance of over $6,000 was handed by the payees' bank to the receiver. The Circuit Court of Appeals for the Second Circuit then held that neither payees nor their trustee had title to said $1,500, and as the sum paid by the collecting bank to the trustee exceeded $1,500, the drawers of the checks were entitled to receive from the trustee $1,500 as preferred *cestuis que trust*.

In the *Berry* case the trust relationship was established by a mistake of fact; in the case at bar—by instructions to the bankrupts constituting them agents for your petitioners to collect the proceeds of said check for $15,000. In both cases the bankrupts had no title to the proceeds of checks made payable to them on the face thereof, and deposited by them prior to bankruptcy to their current checking accounts with their banks.

The Circuit Court of Appeals asserted that its decision on this point in the instant case is based upon *Burton* v. *United States* (196 U. S., 283). We respectfully submit that all that the *Burton* case decided was that a deposit of negotiable instruments endorsed in blank by a depositor to his current checking account with his bank, *without anything else said or done*, establishes the relationship of debtor and creditor between the depositor and his bank. The extension of this doctrine to a re-deposit of said depositor's negotiable paper by his bank with another bank, or to the case where specific instructions accompany the deposit, is unwarranted in principle and is not based upon any authority.

WHEREFORE, in view of the fact that the decision below is untenable and that the important questions of banking and commercial law presented should be settled by this Honorable Court, your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, demanding them to certify and send to this Honorable Court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in this case, *In Re Gubelman*, No. 52 (November Term, 1925), to the end that the said case may be reviewed and determined by this Honorable Court, pursuant to the statute therefor provided, and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem appropriate, and that the decree of said Circuit Court of Appeals in said case as to said check of $15,000, may be reversed by this Honorable Court.

ALEXANDER LATZKO,
WILLIAM LATZKO,
CHARLES LATZKO,
SAMUEL POPPER,
EMIL HOCHSTEIN,
By BRODEK & RAPHAEL,
Attorneys-in-fact.

United States of America,
Southern District of New York, } ss.:
State and County of New York,

Charles A. Brodek, being duly sworn, deposes and says as follows:

I am one of the co-partners of Brodek & Raphael, a partnership, with its principal office at No. 67 Wall Street, in the Borough of Manhattan, City, County and State of New York, who are attorneys-in-fact for Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hochstein, co-partners doing business under the name and style of N. Latzko and A. Popper.

I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

CHARLES A. BRODEK,

Subscribed and sworn to before me
this 5th day of April, 1926.

LOUIS P. EISNER,
Commissioner of Deeds,
New York City.
Term expires May 20, 1926.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of the petitioners should be granted by this Honorable Court.

Dated, New York, April 5, 1926.

CHARLES A. BRODEK,
Counsel for Petitioners.

BRIEF OF THE PETITIONERS.

Facts.

This is an application for a writ of *certiorari* for a partial review of the decision of the Circuit Court of Appeals for the Second Circuit in a reclamation proceeding by petitioners, arising out of the bankruptcy proceedings of Knauth, Nachod & Kuhne. It involves a number of fundamental and important questions of banking and commercial law. In particular, it is concerned with the question of title to negotiable instruments, as between depositor and his bank.

The Circuit Court of Appeals considered the title to three checks, to wit, a check for $1,294, drawn by the National City Bank of New York, to the order of the bankrupts, in favor of the petitioners, deposited by the National City Bank with the bankrupts on June 15th, 1923 (fols. 88-90); a check for $3,000, drawn by the Irving Bank-Columbia Trust Company, to the order of the bankrupts, and deposited with them for the credit of the petitioners on June 14th, 1923 (fols. 82-87); a check for $15,000 drawn by Goldman, Sachs & Company, on the Bank of America, to the order of the bankrupts, accompanied by written directions from said Goldman, Sachs & Company to the bankrupts that said check is paid for the account of the petitioners by order of Julius Baer & Co. of Zurich, Switzerland. The check for $15,000 was delivered to the bankrupts on June 15th, 1923 (fols. 91-93).

An involuntary petition in bankruptcy was informally filed with United States District Judge Knox at 10:30 P. M. on June 15th, 1923, and formally filed with the Clerk of the United States District Court for the Southern District of New York at 9:30 A. M. on June 16th, 1923 (fols. 14 and 15). On June 15th, 1923, the bankrupts deposited said checks for $1,294 and $15,000 with the

American Exchange National Bank of New York, wherein the bankrupts had a current checking account, as the bankrupts were not members of the New York Clearing House. On June 16th, 1923, and subsequent to 9:30 A. M., the American Exchange National Bank collected the said checks for $1,294 and $15,000 respectively, through the New York Clearing House and credited the proceeds thereof to the account of the bankrupts with it (fols. 90 and 95). *The bankrupts did not transmit with the check for $15,000 the instructions of Goldman, Sachs & Company, that said check was delivered to them "for account of Latzkopper, Budapest."*

At the time of the filing of said petition in bankruptcy, the bankrupts were indebted to the American Exchange National Bank in the sum of $250,000, plus interest thereon, which loan was secured by deposit of stocks and bonds. The market value of said stocks and bonds at all times exceeded the amount of said loan and interest (fols. 30 and 156). Thereafter, and pursuant to the orders of the Receiver for the bankrupts, the American Exchange National Bank sold part of the securities and applied the proceeds thereof to the liquidation of said loan, without attaching at any time the sums which stood to the current account of the bankrupts with it (fols. 169-175). Said current account, at the time of the bankruptcy, amounted to a balance in favor of the bankrupts of approximately $211,000, which balance naturally included the proceeds of said checks for $1,294 and $15,000 (fol. 158).

Thereafter, and on July 12th, 1923, the Receiver for the bankrupts instructed the American Exchange National Bank to charge said balance on the bankrupts' current account with it to the liquidation of said loan, and in addition thereto delivered his check for a sum over $18,000, for the difference between the amount of said current account and the balance of said loan (fols. 169-171). Upon the liquidation of said loan from the American Exchange National Bank to the bankrupts, effected in the above manner, the American Exchange National Bank delivered

the stocks and bonds of the bankrupts, which it held for security of said loan, to the Receiver (fols. 172-176). It is admitted that the proceeds of the sale of said securities by the Receiver exceeded the sum of $211,000, the balance of said current checking account of the bankrupts with the American Exchange National Bank. Thus, the petitioners have completely fulfilled the duty of tracing the proceeds of their two checks into the specific fund now held by the trustee for the bankrupts.

The Circuit Court of Appeals held that the petitioners were entitled to the proceeds of said check for $1,294 because the words "in favor of" on the face of the check restricted its negotiability and made both the bankrupts and the American Exchange National Bank mere agents of the petitioners for the collection of the same (fols. 246, 247). It further held that the petitioners were not entitled to the proceeds of said check of $3,000 on the ground that the law takes notice of the fractions of the day for the purpose of determining the title to the property of the bankrupt, and that since said check was collected on June 15th, 1923, prior to the filing of the petition in bankruptcy herein, the title to the proceeds thereof passed to the bankrupts prior to said filing of said petition in bankruptcy (fols. 209 and 228). It finally held that petitioners were not entitled to the proceeds of said check of $15,000 on the ground that in ascertaining title to negotiable instruments, the court merely looks to the form of the instrument itself and not to the writings or instructions accompanying the same, and upon the further ground that the bankrupts, by depositing said unrestricted check with the American Exchange National Bank prior to the bankruptcy, transferred the title to it to the American Exchange National Bank (fols. 252-254).

This application for a writ of *certiorari* to said Circuit Court of Appeals seeks to review the decision of that court only in so far as it affects said check of $15,000.

(Italics throughout this brief are ours, unless otherwise indicated.)

POINT ONE.

The Circuit Court of Appeals erred in holding that the memorandum accompanying the check for $15,000 and stating that the same was delivered to the bankrupts "for account of" petitioners did not constitute a part of the contract between them in regard to the deposit of said check.

It is elementary that the general rules governing the construction of all contracts apply equally to negotiable instruments, so far as their construction is concerned. In particular, a negotiable instrument must be construed in the light of a separate contemporaneous oral or written agreement as forming one single contract with it.

8 *Corpus Juris*, 85.

In the case at bar, the Circuit Court of Appeals said:

> "The important fact is that this $15,000 check is on its face a straight unrestricted cashier's check payable to the order of the bankrupts. The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. *The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners.* This they did as the agents of the petitioners. *The legal effect of the transaction was the same as though the petitioners had themselves deposited the check "for our account" with the bankrupts on June 15th and the latter had at once credited it to the petitioners,* and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account" (fols. 252 and 253).

In the case at bar, the District Court held that:

> "In respect to the last two checks, it is true that 'for account of' ordinarily means for collection and that *an agency may be indicated by a letter of instruction or by a notation as well as by the restrictive endorsement. Boone County National Bank* v. *Latimer,* 67 Fed., 27" (fol. 117).

The holding of the District Court herein and in the *Latimer* case, *supra,* is in accordance with numerous decisions of the State courts of the last resort throughout the United States.

It has long been established that the intention of the parties delivering a negotiable instrument, to part or not to part with title to it, may be evidenced by an oral agreement, or an understanding to that effect.

> *Matter of Marine,* 169 A. D., 65, 67;
> *Turney* v. *Guthrie,* 15 N. Y. Sup., 679, 680;
> *Barker* v. *Prentice,* 6 Mass., 430, 433, 434;
> *German Fire Insurance Co.* v. *Kimble,* 66 Mo. App., 370, 371, 373.

With still greater force, the above rule applies to the case of *written* instructions accompanying negotiable instruments bearing no restrictive indorsements on their face. The following authorities uniformly support the rule of law, that memoranda accompanying negotiable instruments should be construed together and form a part of one and the same contract, evidenced by the negotiable instrument itself and the memorandum accompanying it:

> "Sec. 208. *Instructions accompanying a deposit and coming from the proper authority, must be carefully attended to.* When the depositor orders his money to be put on one of his accounts, or to be applied to

take up a particular check or note, or to be transmitted to a certain person, or *whatever special direction he may give, the bank must obey if it receives the deposit at all.*"

Morse on Banks & Banking (5th ed.), p. 409.

"*It is true that the paper came to the plaintiff's hands by general indorsement from Ives & Son, but the indorsement and the letter of advice in transmission must be read together, and so reading them the legal effect was to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement.* It follows, therefore, that upon the facts found, and as to which there was little if any dispute, the plaintiff never acquired title to the bill. It was an agent merely for its collection. It was only in that character that Ives & Son received the paper from the drawer, and that was the only title that was conferred upon the plaintiff."

Bank of America v. *Waydell,* 187 N. Y., 115, 120.

"While the deposit of a bill or check in the ordinary course of business, the depositor receiving a credit against which he can draw, has the effect of transferring the title (*Briggs* v. *Central Nat. Bank of N. Y.,* 89 N. Y., 182; *Metropolitan Nat. Bank* v. *Lloyd,* 90 id., 530; *Cragie* v. *Hadley,* 99 id., 131). I do not think that was the effect of the original deposit involved in this case. *The words on the deposit slip must be read into the contract.*"

King v. *Bowling Green Trust Co.,* 145 A. D., 398-401.

"A part of this lumber was sold, and a draft was drawn in payment of the same, which draft was indorsed by Cochran & Co., to plaintiff, Long, and for-

warded to him at Chicago, Ill., who, by letter, sent the same to the Bank of Commerce for collection, inclosed in the following letter: 'Chicago, July 24, 1926. Bank of Commerce, Louisville: Please find John L. Cochran & Co. check on your bank for $500, which please place to my credit; also J. L. Cochran & Co. draft, 30 days, after date July 5th, on Rodgers & Co., Peoria, Ill., for $309.81, which please collect and credit. Very truly yours, Jno. S. Long.' * * * We cannot concur with this reasoning of the Judge of a lower court, and, upon carefully examining the evidence in whole case, we fail to find sufficient evidence to support the judgment, and are of opinion that the court erred in refusing appellant a new trial."

Long v. *Bank of Commerce,* 38 S. W., 886, 887.

"The instruction which accompanied the draft when received by the bank was as follows: 'Inclosed herein please find our draft *for collection,* which we have made on the San Antonio Banking Association of your city. Kindly give this your immediate attention, and oblige, yours truly, Townsend, Hostetter & Co.' * * * *There is nothing from which could be implied an authority for the bank to hold the money, and treat it as a deposit."*

Hunt v. *Townsend,* 26 S. W., 310, 311.

"The draft on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce, *was coupled with instructions* from the latter bank for specific application of the proceeds of the draft where collected. *These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor, would result* * * *."

Hutchinson v. *National Bank of Commerce,* 145 Ala., 196, 201.

Finally, the transaction in the case at bar took place entirely within the State of New York. It must be deemed to be covered by the law of New York concerning negotiable instruments. Section 35, of the New York Negotiable Instruments Law, provides as follows:

> "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. * * * the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, *and not for the purpose of transferring the property in the instrument.*"

POINT TWO.

The Circuit Court of Appeals erred in disregarding the settled legal and technical meaning of the expression "for account of" used in the memorandum accompanying the check for $15,000, particularly as there was no evidence whatsoever to show that the parties to the transaction intended to use the expression in any other sense.

The record in the case at bar is barren of any fact showing what was the intention of the parties concerned with the drawing and the delivery of said check for $15,000, apart from the intention implied by the technical and legal meaning of said expression, "for account of."

The Circuit Court of Appeals held in the case herein, and in the case of *Rochling Brothers* against the same bankrupt, decided in the same term as the case at bar, that such words imposed a restriction upon the negotiability of the negotiable instrument and that upon its de-

livery by the customer to his bank, the relationship established was not that of debtor and creditor, but of principal and agent. In the *Rochling* case, the Circuit Court of Appeals said:

> "This case presents exactly the same situation, with a single exception to be noted, as existed in respect of the second check in In re Gubelman, Ex parte Latzko & Popper, decided by this court on December seventh, 1925. There the cheque read, 'Pay to the order of Knauth, Nachod and Kuhne, Favor of M. Latzko & Popper.' Here one cheque read, 'for account of Rochling Bank' and the other a/c Gobt. Rochling.' We held that 'Favor of' was equivalent to 'collect for,' and it seems to us even plainer that 'for account of' is as broad. Indeed this was the form of cheque in *White* v. *National Bank,* 102 U. S., 658. If the drawer chooses to make the payee a fiduciary, he establishes that relation when the payee accepts it, at least until the beneficiary repudiates it, or unless his arrangements with the payee forbid. There can be no question that the drawer has limited the payees from disposal of the cheque in the interest of another, and that is enough."

This holding of the Circuit Court of Appeals is in entire accord with the decision of this court in *White* v. *Miners National Bank* (102 U. S., 658), where this court said:

> "Because of the words 'for account of Miners' National Bank of Georgetown, Colorado,' in this indorsement by Brownell, as president of the bank, the Circuit Court ruled that no obligation arose out of the transaction on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. *And this is the principal question which we are to decide.* * * *

> The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make Mr. White the agent of the bank for the collection of the money."

The check for $15,000 was drawn by Goldman, Sachs & Company, private bankers, upon instruction of Julius Baer & Company, also bankers, at Zurich, Switzerland; was delivered to the bankrupts, another private banking house in New York, for the benefit of the petitioners, private bankers of Budapest, Hungary. In other words, we have a case of a banking transaction between the bankers who *must* be presumed to use banking terms in the sense usually attributed to them by the banking usage and law. It is a case of experts in their particular line of business, employing technical nomenclature in regard to a technical transaction in their branch of business. It is submitted that the law is well settled that in such case, the court must apply the settled technical and legal meaning of the expression "for account of" to said words, as used by Goldman, Sachs & Company in their memorandum, sent by them to the bankrupts with the said check for $15,000.

Even if the trustee-appellee would have attempted to introduce any evidence upon the hearing before the Special Master, the evidence would have been rejected. In *White* v. *Miners National Bank, supra,* this court said in regard to the expression "for account of":

"If this be a sound view of the legal effect of the written indorsement, *neither parol proof nor custom can be received to contradict it.*"

In New York the rule is similar:

"Independent of other objections to the evidence offered, to show the meaning of the words 'free from average,' it is sufficient to say that *evidence of such a character is not admissible, for the purpose of attaching to those words, when forming part of a written contract, a meaning in conflict with, or variant from that given to them by adjudged cases;* by which their meaning, in precisely such contracts has been determined and was a point in judgment."

Bargett v. *Orient Mutual Insurance Co.*, 3 Bos., 385, 397.

And in *Shore* v. *Wilson*, Clark & Fin., 355, the House of Lords said at page 514:

"But, subject to these qualifications, *wherever the words employed bear a definite known meaning, and are capable of being applied according to their plain and ordinary meaning, no evidence is, in my opinion, admissible to show that the party intended to use them in a more extended or in a more qualified sense;* for, otherwise, every man's will and intention, however expressed, would be liable to be defeated. * * *"

In support of our contention that the expression "for account of" in the memorandum accompanying said check for $15,000, should be construed in accordance with its settled legal and technical meaning, the following authorities are relied upon:

"But if no such intention to use the words in any particular or extraordinary sense appears upon the

face of the writing, it then becomes the duty of the court to construe the words according to their plain, general, ordinary meaning, subject to certain qualifications. *First, if the words used be technical terms of law, the court must take them according to their strict legal acceptation, although in general and ordinary use they may have acquired a more extensive or a more limited sense."*

Shore v. *Wilson,* 9 Clark & Fin., 355.

"It may be further laid down as equally well settled, that if parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense."

Findley's Executors v. *Findley,* 11 Gratt. (Va.), 438.

"If it is a word of a technical or legal character it must be construed according to its technical or legal meaning."

Holt & Co. v. *Collyer,* 16 L. R. Chan. Div., 718, 720.

"This being a written contract between two parties, the construction of it belongs to the court; and the court must adopt the usual rules, and construe the provisos or conditions, as well as the other parts of the instrument, according to the ordinary meaning of the language used; *except that terms of art, or technical words, must be understood in their proper sense,* unless the content controls or alters their meaning."

Clift v. *Schwabe,* 3 C. B., 457, 470.

"So, also, if it appears that the term used has an established meaning among those engaged in the business to which the contract has reference, and unless

it be given that meaning, is indefinite and equivocal, *it should be treated, in interpreting the contract, as used according to that understanding* * * *."

Metropolitan Exhibition Co. v. *Ewing*, 42 Fed., 198, 202.

"There are words in deeds as in notes and other instruments which have a technical meaning, and are construed accordingly, but language in deeds or notes, or other instruments, not technical, must be taken in its ordinary and usual sense."

Bradshaw v. *Bradbury*, 64 Mo., 334, 336, 337.

"The rule is well settled that, in ascertaining the meaning of words in a deed or other written instrument, *technical words must be given their technical meaning and signification. Mitchell* v. *Mitchell*, 2 Gill., 238."

Maryland Coal Co. v. *Cumberland & Pa. R. R. Co.*, 41 Md., 343, 352.

POINT THREE.

The expression "for account of" when used in respect to negotiable instrument, is equivalent to "for collection" and establishes between the bank and its depositor the relationship of agent and principal and not of creditor and debtor.

We have cited under the previous point, the case of *White* v. *Miners' National Bank*, 102 U. S., 658, in which this court held that the expression "for account of" restricts negotiability of an instrument in reference to which it is used and prevents the passing of the title to the bank in regard to such instrument, upon the delivery of the same by the depositor to the bank.

The appellee in the brief and petition submitted simultaneously with this petition to this court in the case of Rochling Brothers, contends that the opinion of this court in the *White* case, in so far as it discussed the interpretation of the expression "for account of" was merely a *dictum*. Casual examination of the opinion in this court of the *White* case suffices to refute any such implication. There this court expressly said at page 660:

> "Because of the words 'for account of Miners' National Bank of Georgetown, Colorado,' in this indorsement by Brownell, as president of the bank, the Circuit Court ruled that no obligation arose out of the transaction on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. *And this is the principal question which we are to decide.* * * *"

For over half a century, the *White* case has been an authority for the proposition stated by us *supra*. It has never been doubted, distinguished or overruled. It has been repeatedly relied on by this court in its later decisions and by the highest appellate courts in many states as authority upon the question of restrictive indorsement.

Thus, in *Commercial National Bank* v. *Armstrong*, 148 U. S., 57, this court said:

> "And in *White* v. *Miners' National Bank of Georgetown*, 102 U. S., 658, where an indorsement was 'for account,' the same justice, speaking of the indorsement, said:
>
> 'It does not purport to transfer the title of the paper or the ownership of the money when received.'
>
> The plaintiff then, as principal, could unquestionably have controlled the paper at any time before its payment and this control extended to such time as the money was received by its agent, the Fidelity."

Again, in *Old National Bank of Evansville* v. *German-American National Bank of Peoria,* 155 U. S., 556, 562, this court cited the *White* case as authority on the question of restrictive indorsements.

In *Bank of Metropolis* v. *First National Bank,* 19 Fed., 301, Wallace, J., after referring to indorsement 'for collection' said:

> "In *First National Bank* v. *Pennsylvania Co. Bank,* 3 Fed. Rep., 257, paper was indorsed 'pay to the order of Hetherington & Co. on account of First National Bank, Chicago,' and it was held to be such a restrictive indorsement as to charge subsequent holders with notice that the indorser had not transferred title to the paper, or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the papers seems to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other. Other authorities in support of this conclusion are: *Sweeney* v. *Easter,* 1 Wall., 167; *White* v. *Nat. Bank,* 102 U. S., 658; *Lee* v. *Chillicothe Bank,* 1 Bond., 389; *Blaine* v. *Bourne,* 11 R. I., 119; *Claffin* v. *Wilson,* 57 Iowa, 15."

As late as 1925 Wolverton, J., in *Myassa-Arcadia Drainage District* v. *First Natl. Bank,* 3 Fed. (2nd), 648, cited the *White* case in its customary meaning:

> "Nor does the indorsement 'for account' purport to transfer the title of the plaintiff or the ownership of the money when received. *White* v. *National Bank.*"

In *Tyson* v. *Western Nat. Bank,* 25 Atl., 520, 521, the Court of Appeals of Maryland relied on the *White* case in its conventional sense.

"In the present case the check and draft were deposited with Nicholson & Sons with an indorsement in these words: 'For collection for account of Tyson & Rawls.' This indorsement was not adequate to pass to Nicholson & Sons the title to these papers. It has been so held by this court, and the Supreme Court of the United States and other courts * * *.

In *White* v. *Bank*, 102 U. S., 658, it was said: 'The plain meaning of it (the indorsement) is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

In *Freiberg* v. *Stoddard*, 28 Atl., IIII, the Supreme Court of Pennsylvania considered the *White* case as holding that "for account of" implied restriction on the negotiability of an instrument:

"An indorsement for collection is restrictive, and carries no power of sale with it. In such case, the indorsee is a mere agent for an indorser and such indorsement has been said not to amount to a transfer of title. So an indorsement 'for collection for my account,' or 'for account of it,' is restrictive and does not pass the title, or the right to proceeds, of the instrument. The indorsee takes the instrument as agent or the trustee for the indorser; and if he disposes of it for his own use, the indorser may recover from the purchaser the amount collected on it, or he may recover the bill itself in an action of trover. By such restrictive indorsement the increase takes the instrument, subject to the trust created. *Rand Com. Paper*, Par. 726; *Daniel Neg. Inst.*, Par. 698; *White* v. *Bank*,

102 U. S., 658; *Sweeny* v. *Easter*, 1 Wall., 166; *Bank* v. *Gregg*, 79 Pa. St., 384; *Hackett* v. *Reynolds*, 114 Pa. St., 328."

In *U. S. National Bank* v. *Geer*, 55 Neb., 462, 464, 465, the highest court of Nebraska said:

> "In *First National Bank of Chicago* v. *Reno County Bank*, 3 Fed. Rep., 257, it was distinctly decided that an endorsement of a bill of exchange directing the drawee to pay to another 'on account of the endorser,' or 'for collection' is a restrictive endorsement carrying with it notice that the endorser did not thereby part with title to the paper or to its proceeds when collected. To the same effect are *Beal* v. *City of Somerville*, 50 Fed. Rep., 647; *Sweeney* v. *Easter*, 68 U. S., 166; *Balbach* v. *Breylinghuysen*, 15 Fed. Rep., 675; * * * *White* v. *Miners' Nat. Bank*, 102 U. S., 658."

There are numerous authorities preceding the decision of the United States Supreme Court in the *White* case, uniformly holding that words "for account of" restrict the negotiability of commercial paper.

Thus in *Treuttell* v. *Barandon*, 8 Taut., 100, the court held that an indorsement "pay to J. or order for account of N." constituted a restrictive indorsement. The court remarked that such indorsement has been known to commerce and law for many years and has always been considered as implying restriction of negotiability.

In *Lee* v. *Chillicothe Branch of State Bank*, 15 Fed. Cas. (Nos. 8186, 8187) 150, 151, 152, both the District and the Circuit Courts discussed at length various restrictive indorsements, including words "for account of" and stated that:

> "It imports that indorsee receives the bill for a special purpose, and as a trustee for the party in-

dorsing; and is equivalent to direct notice to every customer to whom it may be afterwards presented, that he has no right to dispose as his own property."

In *First Nat. Bank* v. *Lynn*, 132 Mass., 227, 228, the deposit was: "for account of First National Bank of Lynn, Mass." The court said:

"The words 'for account of' merely indicate the relations which the two banks hold to each other in the transaction. At the most, they show that the note was indorsed to the bank in Boston, not upon a valuable consideration, but for collection."

In *Hackett* v. *Reynolds*, 114 Pa., 328, the indorsement was "Pay S. H. Lamberton, Cashier, or order, for account, Penn Bank, Pittsburgh. G. L. Reiber, Cashier," and the court said of Reynolds, Lamerton & Co., that

"They had an undoubted right to treat the Penn Bank as the actual owner of the note."

In *Leary* v. *Blanchard*, 48 Me., 269, the deposit was "for account of the Atlas Mutual Insurance Co." The court stated at page 274:

"The indorsement, by its terms, was restricted, and the ordinary and popular sense cannot be changed by parol evidence. 1 Greel. Ev., Par. 295."

In *First Nat. Bank of Belmont* v. *First Nat. Bank of Barnesville*, 58 Oh. St., 207, the court said:

"• • • when, the indorsement is 'for collection' or 'for account of' it is notice to the drawee bank that the bank presenting the check for payment is not the owner but only the agent of the owner, and that the money is to be remitted to the owner, back through

the same channel through which the check or bill was received by the collecting bank."

In *First National Bank of Chicago* v. *Reno County Bank,* 3 Fed. Rep., 257, the court said, at page 261:

> "July 29, 1878. Pay to the order of W. Hetherington & Co., Atchison. Account of First National Bank, Chicago. L. J. Cage, Cashier."
>
> "This was clearly a restrictive indorsement, the effect of which was to restrict the further negotiability of the bills and to give notice to the defendant that the plaintiff did not thereby give title to them, or to their proceeds, when collected. 1 Daniell on Negotiable Instruments, Par. 698, and cases cited."

The result of the above doctrine, under which it was consistently held that the expression "acount of" restricts the negotiability of commercial paper and are equivalent to the expression "for collection," is best described by the court in *First National Bank of Belmont* v. *First National Bank of Barnesville, supra,* at page 214 (decided in 1898):

> "Some years ago the practice of indorsing checks 'for collection' or 'for account of,' had become almost universal, and when it was decided in the above cases of *National Park Bank of New York* v. *Seaboard Bank,* 114 N. Y., 28 and *Northwestern National Bank of Chicago* v. *Bank of Commerce of Kansas City,* 107 Mo., 402, that the drawee bank could not recover back the money, in the one case from the collecting bank, nor in the other from the bank owning the draft, it startled the banks located in large cities and awakened them to the dangers attending the payment of such drafts or bills, and the result was that in the year 1896, the clearing house in the City of New York

> adopted a rule to the effect that its members should not send through the exchanges any paper having any qualified or restrictive indorsements such as 'for collection' or 'for account,' unless all indorsements were guaranteed by the bank sending such paper. This action was soon followed by the clearing houses in other cities and in some of them all indorsements are required to be either in blank, or 'pay to * * * or order.' By this action of the clearing houses, indorsements 'for collection,' or, 'for account of,' have fallen into disuse, and the banking business of the country is now done, almost univorsally, upon unrestricted indorsement."

The Circuit Court of Appeals, in disregarding the settled meaning of the expression "for account of," based its decision as to the check for $15,000 upon the assumption that:

> "The legal effect of the transaction was the same as though the petitioners by themselves deposited the check 'for our account' with the bankrupts on June 15th * * *" (fol. 252).

It is respectfully submitted that even if petitioners themselves had deposited said check for $15,000, drawn as it was upon the Bank of America, and instructed the bankrupts that it was deposited "for our account," such deposit would have constituted the bankrupts mere agents for the collection of the proceeds of said check. It is only *after the collection* of said check by the bankrupts, that a relationship of debtor and creditor would have arisen between the bankrupts and petitioners by reason that the petitioners had a current checking account with the bankrupts.

American National Bank v. *Miller*, 229 U. S., 517, 520;

In re Jarmulowsky, 249 Fed., 319, 320, 321, 322;
In re Havens,' 2 Bened., 309, 310, 311;
Levi v. *National Bank of Missouri,* 5 Dill., 104, 106, 109;
Manufacturers National Bank v. *Continental Bank,* 148 Mass., 553, 558, 559;
First Nat. Bank of Crown Point v. *First Nat. Bank of Richmond,* 76 Ind., 561, 569, 570;
Morse on Banks & Banking (5 Ed.), Sec. 567.

The indorsement or a direction by a depositor to his bank that a deposit of negotiable instrument is "for his account," restricts the negotiability of that instrument. The question simply is this: Who is the beneficial owner of the proceeds of the check? Clearly the depositor, because he desires this particular instrument to be collected for *his* account and not *for the account of his bank,* i. e., for the benefit of himself and not for the benefit of the bank. So long as the bank is not collecting a negotiable instrument for its own benefit, it certainly has no title to it or to the proceeds thereof.

In *Lee* v. *Chillicothe Branch Bank* (#8186), 15 Fed. Cas., the District Court said, at pages 150-151:

> "Without stopping to analyze the many cases referred to, in which indorsements have been held to be restrictive in their character, as suspending the further negotiability of commercial paper, the following instances may be briefly stated: 'pay to *my* use,' 'pay the money to my servant *for my use,'* * * *."

On appeal the Circuit Court said (No. 8187; 15 Fed. Cas.), at page 152:

> "Whether an endorsement be restrictive or not, depends upon the intention of the parties as expressed: 'pay to A *for my account';* 'pay the contents *to my*

use'; 'pay the money to my servant *for my use'*; these are specimens from cases where the endorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of the restriction, the negotiability of the bill ceases. * * *"

Section 66 of the New York Negotiable Instruments Law provides:

> "An indorsement is restrictive, which either: (3) Vest the title in the indorsee in trust for *or to the use of some other person.*"

And it has been repeatedly held that the word "indorsement" as used in the law of negotiable instruments, means not only inscription of the instrument itself but also any writing accompanying it.

> *Goetz* v. *Bank of Kansas City,* 119 U. S., 551;
> *Bank of America* v. *Waydell,* 187 N. Y., 115, 120.

POINT FOUR.

The Circuit Court of Appeals erred in holding that where a negotiable instrument indorsed in blank is delivered by the depositor to his bank with specific instructions in regard thereto, and the bank deposits said negotiable instrument with another bank but omits to forward said instructions, the depositor is thereby divested of title to said instrument.

The Circuit Court of Appeals in its opinion in the case at bar stated (fols. 252 and 253):

> "The legal effect of the transaction was the same as though the petitioners had themselves deposited

> the check 'for our account' with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account. *That transaction made the American Exchange National Bank the owner of the check on June 15 and the proceeds when collected on June 16th belonged not to the petitioners or to the bankrupts but to the bank which was the owner of the check when it was collected.* We think the transaction is governed by the rule laid down in the *Burton* case, and that the relation between the petitioners and the bankrupts on June 15, when this check was credited by the latter to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners * * *."

It is clear from the facts herein that petitioners completely traced the proceeds of the said check for $15,000 to the securities of the bankrupts returned by the American Exchange National Bank to the trustee for the bankrupts. Hence no question arises as to any equities on the part of the American Exchange National Bank to the proceeds of said check for $15,000. It therefore follows that the American Exchange National Bank was merely a gratuitous holder of said proceeds of said check for $15,000 without having parted with any consideration past or present therefor.

The doctrine that the Circuit Court of Appeals intended to apply to the case at bar is unsound and has been so held by the same Circuit Court and other State and Federal courts.

A deposit accompanied by instruments establishing between the depositor and his bank the relationship of principal and agent, thereby creates a confidential relationship

between them, and the proceeds of such deposit are trust moneys, the title to which remains in the depositor so long as he is able to trace the same.

That when there is a relationship of principal and agent between the depositor and the bank, the proceeds of negotiable instruments received by the agent are deemed to be held by the agent *in trust* for the principal, was held by this court in *Central National Bank of Baltimore* v. *Connecticut Mutual Life Insurance Co.*, 104 U. S., 54, where the opinion reads as follows at pp. 70 and 71:

> *"The relation of Dillon to the Insurance Company was one of confidence and trust. He was its agent for the collection of premiums,* which belonged to it no less when in his hands than before their receipt by him. He was to account for them, under its directions, and in his entire dealing with them was bound to obey its orders. He was not merely its debtor for the amount in his hands. He held the fund for the use and as the property of the Company. *Foley* v. *Hill,* 2 H. L. Cas., 28."

And in the same case this court, citing from *Pennell* v. *Defell,* 4 De Gex. M. & G., 372, said at page 67:

> "In the same case, Lord Justice Knight Bruce said: page 383: 'When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the cestuis que trust, it must be deemed specifically theirs, as between

the trustee and his executors, and the general creditors after his death on one hand, and the trust on the other.' He added: 'This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee or owing also to him, money in every sense his own.'"

In *Van Alen* v. *American National Bank*, 52 N. Y., 1, 4, the court said:

"This action is based upon another principle equally well settled, viz., that so long as money or property belonging to the principal or the proceeds thereof may be traced and distinguished in the hands of the *agent or his representatives or assignees*, the principal is entitled to recover it unless it has been transferred for value wihout notice (2 Gratt., 544; *Pennell* v. *Deffell*, 4 De Gex. M. & G., 372; 6 Jones Eq., 34: H. & M., 417; 2 Kent Com., 796, 801). It appears to me clear that Van Alen & Rice were the agents of the plaintiff to sell the bonds, and were bound to keep the proceeds of the same for him. He owned the bonds, directed their sale, and also directed that the proceeds should be kept for him in a particular manner, and he was notified by Van Alen & Rice that they had been sold and the avails placed and would be kept as directed. These undisputed facts establish the relation of trustee and *cestui que trust* between the plaintiff and Van Alen & Rice as to the proceeds of these bonds."

In *Roca* v. *Byrne*, 145 N. Y., 182, 187, the court said:

"It is undoubtedly true that the relation of debtor and creditor existed, according as the state of the account showed the balance to be one way or the other; but that fact was not inconsistent with, and

could not affect, the fact that the relation was also of a fiduciary character. *Byrne received all drafts in virtue of his agency and they, or the proceeds, were received for the purposes connected with that agency.* * * * *The legal title to the moneys may have been in him; but the right, in equity, to follow them, as the proceeds of their drafts, was in the plaintiffs. If Byrne, or his representatives, placed the moneys in the bank to the credit of his account, that would not affect the question as to whom they belonged beneficially; a question which equity, in a proper case, will always inquire into.* If received, as here, in the course of transactions between the principal and the agent, the character of the moneys would be unchanged by the deposit; provided they could be identified. They would still be moneys held for the principal."

To the same effect are the following authorities:

"It is undeniable that equity will follow a fund through any number of transmutations and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee, or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposit it thereby became a debtor to the depositor. The debt might have been paid in answer to his claims and thus the liability have been extinguished. * * * But surely it cannot be maintained that when the principals asserted their right to the money * * * his right to reclaim it had not ceased. *A bank can be in no better situation than any other debtor.* * * *

"In *Frazier* v. *The Erie Bank*, 8 W. & S., 18, it was ruled that if an agent procure the note of his princi-

pal to be discounted and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, and this though the bank had no notice when the deposit was made that the money deposited did not belong to the agent."

Farmers & Mechanics' Nat. Bank v. *King*, 57 Pa., 202, 205, by Mr. Justice Strong, subsequently a member of this court.

"The plaintiff, being the holder of a negotiable *note indorsed in blank*, delivered it, without putting, his name on it, to an agent to procure it to be discounted. *The agent indorsed it in his own name, and sent it to a bank, and the messenger represented that the money was wanted for the accommodation of the agent.* The bank discounted the note and passed the proceeds to the credit of the agent, and the same were then attached as his property, in the possession of the bank, on a trustee process. The plaintiff forthwith informed the bank that the note belonged to him and demanded payment of the proceeds. Held, that the bank was responsible to him therefor."

Headnote in *Merrill* v. *Bank of Norfolk*, 19 Pick., 32;

"*The draft* on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce *was coupled with instructions from the latter bank for specific application of the proceeds of the draft when collected. These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor would result; and the collecting bank could not without the consent of the initial bank and in violation of the latter's instructions, alter or change*

the relation so created by any subsequent conduct or action of its own in dealing with the proceeds of the draft when collected. * * *

In the case at bar, it is shown that Erwin & Co. paid the draft of the Bank of Commerce by their draft on Schuessler & Sons, which was sent by the Shapard Bank to the Bank of Lafayette. The last named bank collected the money from Schuessler and Sons, which it afterwards paid to the assignees of the Shapard Bank. *So the fund in question is traced directly into the hands of the assignees, and was accompanied with the trust character with which it was originally impressed."*

Hutchinson v. *National Bank of Commerce,* 41 So., 143, 144.

"Beneficiaries who do not receive from their trustee *or agent* what he ought to pay them may either bring an action, with or without an attachment of property, taking the position of an ordinary creditor, or they may seem to enforce their rights by such equitable remedies as are available to them. And while the defaulter remains solvent, so that he can be compelled to meet all his obligations, legal or equitable, there may be not difficulty in allowing them to proceed simultaneously in both ways. But upon the bankruptcy of their debtor or defaulter the case becomes different. If they appropriate to themselves a fund which they can reach upon the equitable doctrine that we have stated, they thereby assume a different position from that of ordinary creditors of a common debtor; they assert rights superior to those of ordinary creditors; and by the enforcement of those rights they diminish the fund to which those creditors must look for a dividend."

Hewitt v. *Hayes,* 205 Mass., 356, 363.

The principle of the above cases has been invariably applied to banking transactions and constitutes an integral part of the banking law of this country.

> *"Instructions. If the customer gives any instructions or directions* concerning any item in the method which is to be pursued in collecting or protesting the paper, *the bank receiving the paper is bound to forward such instructions and directions to its agent or correspondent."*
>
> *Morse on Banks & Banking* (5th Ed.), page 458.

The Circuit Court of Appeals for the Second Circuit applied this doctrine in the case *In re Berry,* 147 Fed., 208, 210, 211, where it said:

> "Stripped of all complications and entanglements we have this naked fact that Raborg and Manice by mistake paid Berry & Co. $1,500 which they did not owe and which Berry & Co. could not have retained without losing the respect of every honorable business man. * * *
>
> It is unnecessary to enter further into details of the bank's transactions subsequent to the failure; it is enough to say that as the final result of the bank's liquidation of the account of $6,310.41 was delivered to the trustees in bankruptcy. But for the mistake of Raborg & Manice this sum would have been $4,810.31 which is all the bankrupts' creditors are entitled to. The $1,500 should be paid by the trustees to Raborg & Manice, its lawful owners."

In the case at bar the Circuit Court of Appeals held in regard to the check for $15,000.00:

> "The proceeds when collected on June 16, belonged not to * * * the bankrupts, but to the bank which

was the owner of the check when it was collected" (fol. 253).

In the *Berry* case, *supra,* the same court held that the bankrupts had no title to the proceeds of a check deposited by them to their current checking account with their bank prior to the filing to the petition in bankruptcy. It did not hold in the *Berry* case that the bank of the bankrupts acquired title to said proceeds as it did in the case at bar.

Similarly, in *Titlow* v. *McCormick,* 236 Fed., 209, the bankrupt bank received for collection certain school district warrants, which it collected through *three* different correspondent bank. At the time of the bankruptcy, it had a credit balance with *one* of these banks. The Circuit Court of Appeals for the Ninth Circuit said at page 215:

> "The record does show, however, that such deposit of the United States National Bank of Centralia with the Bank of California of Tacoma was not entirely dissipated, but there remained of such deposit at the time of the suspension of the former the sum of $1,585.36, which passed into the hands of the receiver of its assets, and to which only the appellee is, in our opinion, entitled to a preference over the general creditors of the insolvent bank."

To the same effect is *In re Royea's Estate,* 143 Fed., 182, where the court said at pages 183, 184:

> "It appears from the record that at the time of adjudication the bankrupt had on deposit in a bank $390.70, which has since come into possession of the trustee of his estate. The deposit included $120, which the petitioner had theretofore intrusted to the bankrupt for safe keeping. * * * The bankrupt did not keep the money separately, but made a deposit thereof

in a bank in which he had other money on deposit, so that it became mingled with other money held by the bank subject to his check, and the balance to his credit exceeded the amount received from the petitioner, at all times continuously from the date of the deposit until it was withdrawn by the trustee, who now has it in custody. * * * In this case, although the money cannot be specifically identified, the fund is clearly proved to have been enlarged by mingling trust money with other money, and the equitable right of the petitioner to reclaim the amount equivalent to the amount intrusted is clear. *San Diego County* v. *Cal. Nat. Bank*, 52 Fed., 59; *Massey* v. *Fisher*, 62 Fed., 958; *City of Spokane* v. *First Nat. Bank*, 68 Fed., 982; *Bradenburg on Bankruptcy* (3d Ed.), page 768."

Still better illustrations of the principle, that the depositor's bank cannot change the nature of the deposit by mere failure to transmit to the collecting bank specific instructions given to it by its depositor are the three following cases:

In *Drovers' Nat. Bank* v. *O'Hare*, 119 Ill., 646, customers of the Drovers' Bank made a deposit stating that it was for the credit of Henry Bank "for the use of M. J. O'Hare." The Drovers' Bank sent a check for the account of said deposit to the Northwestern National Bank, stating that the said amount was for the credit of Henry Bank but omitting to mention O'Hare's interest. The Henry Bank failed, before O'Hare was paid, and the Northwestern Bank applied the amount of the check of the Drovers' Bank to wipe out the indebtedness of the Henry Bank to it.

The court said:

"But if the Henry Bank must, from the character given the funds in the hands of the appellant, account

to the appellee therefor, it was the duty of appellant to give notice to any intermediary it might select, of the trust character impressed upon the funds, and not permit it to be carried to the general account of the trustee, to be applied upon its debts (Perry on Trusts, 406, 443, 444, and authorities cited). • • •

In what is claimed as an attempt to transfer the funds to the Northwestern National Bank, appellant withheld all indications of the trust character of the funds, or that it was other than money going to the general account of Henry Bank. To this appellee in nowise consented, and appellant stands in no better position that if it had retained the money in its custody."

The above decision was followed in the *Union Stock Yards Nat. Bank* v. *Dumond*, 33 Ill. App., 102, where the check was deposited "for the use of George W. Dumond," and the court said at page 103:

"Here the fault of the Stock Yards Bank was in depositing the money of Dumond with the Merchants' National Bank, without preserving its identity in pursuance of instructions which were entirely plain. Having accepted the money with the instructions, it should have pursued the course marked for it."

Finally, in *Beaver Boards Co.* v. *Imbrie & Co.*, 282 Fed., 655, 656, the court held that:

"The check deposited with the broker here was accompanied by the express written stipulation: 'Which you will hold *for my account* against any purchases of stock on my order, same to be held by you until the account is closed.' • • • *Depositing the money in the general account of the broker did not alter its character as between Imbrie & Co. and Lynch. Central Nat. Bank* v. *Coun. Mutual Ins. Co.*, 104 U. S., 54."

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[43946]

APR 28 1927
WM. R. STANBURY
CLERK

Supreme Court of the United States

OCTOBER TERM—1926.

No. [redacted] 48

ALEXANDER LATZKO, ET AL.,

Petitioners,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc.,

Respondent.

N[redacted] 49

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc.,

Petitioner,

against

ALEXANDER LATZKO, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR ALEXANDER LATZKO, et al.

CHARLES A. BRODEK,
BORRIS M. KOMAR,
Counsel for Petitioners in No. 337
and Respondents in No. 338.

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Supreme Court of the United States

OCTOBER TERM, 1926.

Nos. 337 and 338.

In the Matter

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,

Bankrupts.

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER,

Petitioners-Respondents,

THE EQUITABLE TRUST COMPANY OF NEW YORK, as trustee in bankruptcy, etc.,

Respondent-Petitioner.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR ALEXANDER LATZKO, et al.

STATEMENT.

1. These appeals arose out of a reclamation proceeding by N. Latzko and A. Popper against

the above-named bankrupts. In No. 337, said firm appeals from so much of the decision of the United States Circuit Court of Appeals for the Second Circuit, made and entered December 14th, 1925 (R., 92), as affirmed the decree of the United States District Court of the Southern District of New York, made and entered February 20th, 1925 (R., 36, 37), as to a certain check for $15,000. No. 338 is a cross-appeal by the above-named trustee from so much of the said decision of the Circuit Court of Appeals as reversed the said decree of the District Court as to a certain check for $1,294. No appeal was taken by either party as to the decision of the Circuit Court of Appeals as to a certain check for $3,000.

2. The official report of the opinion delivered by the Circuit Court of Appeals is found in 10 Fed. (2nd), 1926 (R., 62-86).

3. The statute under which the jurisdiction of this court is invoked is the Act of February 13th, 1925, amending Section 240 (a) of the Judicial Code. The petitioners' writs of certiorari and briefs in support thereof were filed on April 12, 1926, and the orders granting the petitions were filed on April 26, 1926 (R., 95).

FACTS.

Petitioners in No. 337 (respondents in No. 338) are international bankers, under the firm name of N. Latzko and A. Popper, with a main office in the City of Budapest, Hungary, for whom the bankrupts Knauth, Nachod & Kuhne acted as New York correspondents (R., 4). For brevity the firm of N. Latzko and A. Popper is hereinafter referred to as "petitioners" and the trustee of the bankrupts is referred as "respondent."

Events Prior to Filing of Petition in Bankruptcy.

On June 15th, 1923, the National City Bank of New York delivered to Knauth, Nachod & Kuhne in New York City, its cashier's check for $1,294, payable only through the New York Clearing House, to the "order of Knauth, Nachod & Kuhne, New York, *favor N. Latzko & A. Popper, Budapest*" (R., 30). On the same day Goldman, Sachs & Co. delivered to Knauth, Nachod & Kuhne their check for $15,000 drawn on the Bank of America, and accompanied by a written memorandum stating:

> "We hand you herewith our check for Fifteen Thousand Dollars for *account of Latzkopper, Budapest*, by order of Julius Baer & Co., Zurich, as per cable, June 15, from same" (R., 30).

On the same day Knauth, Nachod & Kuhne credited the account of petitioners on their books with the amounts of said checks, endorsed the same to the order of the American Exchange National Bank, and delivered them to the latter for collection (R., 30, 32). The check for $15,000 was delivered by Knauth, Nachod & Kuhne to the American Exchange National Bank without said memorandum delivered to them by Goldman, Sachs & Co.

Bankruptcy of Knauth, Nachod & Kuhne.

At 10:30 P. M. on June 15th, 1923, an involuntary petition in bankruptcy was presented to Knox, D. J., and an order was signed by him appointing

a receiver. At 9:30 A. M. on June 16th, 1923, *before banking hours,* the petition in bankruptcy and the order appointing the receiver were filed with the Clerk of the United States District Court for the Southern District of New York (R., 5, 6). On the same day the receiver wrote to the American Exchange National Bank apprising it of his appointment and directing it to hold any funds of the bankrupt for his account (R., 32).

On the same day, *and during banking hours,* said two checks totalling $16,294 were collected by the American Exchange National Bank. No business was transacted by the bankrupts subsequent to June 15th, 1923, and the final balance of the current account of the bankrupts with the American Exchange National Bank was the sum of $212,127.86 in favor of the bankrupts (R. 51).

Course of Dealing Between Petitioners and Bankrupts.

Petitioners maintained a current checking account with the bankrupts. At the time of the deposit of said checks by said banks with the bankrupts for account of petitioners, petitioners had a credit balance with the bankrupts, amounting to several thousands of dollars and were not then and have not been at any time since then, indebted either to the bankrupts or to the receiver (R., 9, 22).

Petitioners did not treat evidences of debt deposited with the bankrupts for collection or otherwise, as a deposit of cash or as an immediate credit open to petitioners by the bankrupts, nor did petitioners draw upon the bankrupts against the deposit or deposits of such evidences of debt before the collection by the bankrupts of moneys due upon said evidences of debt (R., 6, 7).

The petitioners never drew upon the bankrupts against their account before the collection by the bankrupts of the moneys due upon any evidences of debt deposited by the petitioners to their account with the bankrupts (R., 22).

The petitioners had no agreement with the bankrupt to treat evidences of debt deposited with them for collection or otherwise as a deposit of cash, nor that an immediate credit should be given by the bankrupts to petitioners upon the receipt of such evidences of debt (R., 6). *All of the above facts are admitted by the respondent* (R., 21).

Tracing Proceeds of Petitioners' Checks Into Trustee's Hands.

At the time of the filing of the petition in bankruptcy, the bankrupts were indebted to the American Exchange National Bank for $250,000 (R., 52) secured by collateral consisting of bonds and stocks, which, taken at their then market value, greatly exceeded the amount of said loan (R., 10).

Between June 22nd, 1923, and July 12th, 1923, the American Exchange National Bank, pursuant to the orders of the receiver, sold part of said collateral and applied the proceeds thereof to the liquidation of said loan (R., 52, 54, 55, 56). On July 12th, 1923, the receiver instructed the American Exchange National Bank to apply the balance of said current checking account between it and the bankrupt, to-wit: $212,066.16, to the payment of the balance of said loan then amounting to $229,503, plus $1,140.99 interest thereon (R., 57).

On the same day the receiver delivered to the American Exchange National Bank his check for $18,851.83 in liquidation of the balance of said

loan, and in return therefor the American Exchange National Bank delivered to him the balance of the stocks and bonds held by it as a collateral for said loan (R., 57, 58, 59). Hence, the proceeds of petitioners' said checks first went into said balance of bankrupts' current checking account with the American Exchange National Bank, and then were used by the Receiver to redeem part of the bankrupt's collateral with the American Exchange National Bank, and went into the bonds and stocks delivered by said bank to the receiver on July 12th, 1923.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held that petitioners were entitled to the proceeds of the check for $1,294, because the words "favor of" on the face of the check restricted its negotiability, and made both the bankrupts and the American Exchange National Bank mere agents of the petitioners for the collection of the same (R., 82, 83). It held that petitioners were not entitled to the proceeds of the check for $15,000 on the ground that in ascertaining title to negotiable instruments, the court merely looks to the form of the instrument itself and not to the writings or instructions accompanying the same, and upon the further ground that the bankrupts, by depositing said unrestricted check with the American Exchange National Bank prior to the bankruptcy, transferred the title to it to the American Exchange National Bank (R., 84, 85), although the latter bank gave nothing of value for it.

Distinguishing Features from the Rochling Case (No. 322).

The following additional questions of law are involved in this case and are not involved in the Rochling case:

(a) Whether written restrictive instructions accompanying checks endorsed generally and deposited by customer to his current checking account in a bank, restrict the negotiability thereof in the same manner as if said instructions were written on the checks themselves.

(b) Whether depositor's bank, in receiving negotiable instruments indorsed in blank from the depositor accompanied with specific instructions in regard thereto, and in failing to transmit said instructions to its correspondent bank when it delivers to it said negotiable instruments, thereby divests the title of the depositor to said negotiable instruments if said specific instructions restrict the negotiability of said instruments.

(c) Whether the act of the depositor's bank as described under (b) bears upon the title to the proceeds of said negotiable instruments in a contest between the depositor's bank and the depositor, in the case where the depositor's bank fails prior to the collection of said negotiable instruments, and the proceeds thereof are traced to a specific fund in receiver's hands.

The following material differences of fact exist in the records of these cross appeals and appeal No. 322.

(a) *All the checks in No. 322 (Rochling case) were cashier's checks,* while the check for $15,000 in the above appeals was *an ordinary uncertified check.*

(b) In appeal No. 322 Rochling Brothers desired *immediate financial credit* from the bankrupts on the day of the deposit of the checks, while the petitioners herein *never asked or expected* immediate credit for their checks prior to their collection.

(c) In appeal No. 322 Rochling Brothers *received interest* on their deposit from the bankrupts immediately upon making the same, while the petitioners herein *received nothing* on their deposits.

(d) It does not appear in the Rochling case that Rochling Brothers did not treat their deposits as a deposit of cash or as an immediate credit to them; nor did it appear that Rochling Brothers ever drew upon the bankrupts against their deposits before the collection by the bankrupts of negotiable instruments deposited with them by Rochling Brothers.

Errors Relied Upon by Petitioners.

Petitioners urge the following errors:

1. The Circuit Court of Appeals erred in holding that the title to said check for $15,000 was in the bankrupts prior to the filing of the petition in bankruptcy, and not in your petitioners.

2. The Circuit Court of Appeals erred in disregarding the admitted course of dealing between the petitioners and the bankrupts.

3. The Circuit Court of Appeals erred in holding that as between the bankrupts and your petitioners, the title of your petitioners to said check for $15,000 was divested by the delivery thereof by the bankrupts to the American Exchange National Bank and the crediting thereof by said bank to the account of the bankrupts prior to the filing of the petition in bankruptcy herein.

4. The Circuit Court of Appeals erred in holding that instructions contained in papers accompanying deposits of negotiable instrument do not constitute a part of the contract of deposit thereof between the bankrupts and your petitioners.

5. The Circuit Court of Appeals erred in disregarding the settled legal and technical meaning of the expression "for account of" used in the memorandum accompanying the check for $15,000.

6. The Circuit Court of Appeals erred in holding that the delivery of a negotiable instrument deposited by a customer with his bank, with specific instructions restricting its negotiability, to its correspondent bank, without transmitting said instructions, divests the depositor of title to said instruments and the proceeds thereof.

7. The Circuit Court of Appeals erred in holding that a trustee of the bankrupt has a better title to the proceeds of said check of $15,000 than the bankrupts would have had, because the same was deposited with and collected by the correspondent bank of the bankrupts, since the trustee stands not in the shoes of the American Exchange National Bank but in those of the bankrupts.

Summary of the Argument.

The argument herein consists of seven points. Point Seven, dealing with the tracing of the proceeds of the petitioners' checks herein, is not controverted.

The first four points discuss the application to the facts at bar of the decision of this court in *White* v. *Miners' National Bank,* 102 U. S., 658. Assuming that this court reaffirms the doctrine of the *White* case, there will be no necessity of considering the remaining two points.

Points Five and Six deal with the application of the decision of this court in *Burton* v. *United States*, 196 U. S., 283, to the checks herein involved and show that even if the doctrine of the *White* case is not applied, the petitioners are still entitled to recover the proceeds thereof from the trustee. The above points in detail are as follows:

1. The Circuit Court of Appeals correctly held that the settled legal and technical meaning of the expressions "favor of" and "account of" when used in connection with negotiable instruments implies restriction of their negotiability.

There is nothing in the record at bar that shows that the parties concerned intended to use said expressions in connection with the checks herein involved in any other sense.

2. *White* v. *Miners' National Bank* has been considered an authority for the proper meaning of the words "account of" for half a century, and is in accordance with earlier authorities.

Respondent's attempted distinctions of the doctrine in *White* case from the facts at bar were properly rejected by the Circuit Court of Appeals.

3. The Circuit Court of Appeals erred in holding that the memorandum accompanying the check for $15,000 and stating that the same was delivered to the bankrupts "for account of" petitioners, did not constitute a part of the contract controlling the title of the parties to said check.

4. The Circuit Court of Appeals erred in holding that where a negotiable instrument indorsed in blank is delivered by the depositor to his bank with restrictive instructions and the bank deposits said negotiable instrument with another bank but omits to forward said instructions, the depositor is thereby divested of title to said instrument.

5. This court in *Burton* v. *United States* merely intended to approve the New York rule but not to go beyond it.

The court is bound by the established course of dealings between petitioners and bankrupts in determining the title to the checks in question.

6. Admitted facts herein showing that petitioners never treated any of their deposits as cash, or as an immediate credit, nor ever drew against their deposits before the collection thereof by bankrupts, nor was it possible for them to so draw, nor were they indebted to bankrupts at any time, conclusively establish, in the absence of any express agreement to the contrary, that petitioners had no right to draw against their deposits prior to the collection thereof by bankrupts, and that the relationship between them and bankrupts was that of principal and agent and not that of creditor and debtor.

7. Petitioners duly fulfilled the duty of tracing the proceeds of their checks to the specific funds in the hands of the trustee in bankruptcy.

(Italics throughout the argument are ours, unless otherwise indicated.)

ARGUMENT.

POINT ONE.

The Circuit Court of Appeals correctly held that the settled legal and technical meaning of the expressions "favor of" and "account of" when used in connection with negotiable instruments implies restriction of their negotiability.

There is nothing in the record at bar that shows that the parties concerned intended to use said expressions in connection with the checks herein involved in any other sense.

The position taken by respondent is that the words "in favor of" and "for account of" were used merely as an identification of the account in the bankrupt's books that was to be credited.

This is an extraordinary argument. Here is the case of several domestic and foreign banks dealing with each other. Such banks undoubtedly are presumed to know banking customs and methods of conducting banking business. Hence, for all the purposes of this case, it may be assumed that the National City Bank of New York and the Banking House of Goldman, Sachs & Co. were well aware of the fact that bankrupts, also a banking house, maintained proper books of account, that in such books transactions of their customers were recorded in due course of affairs, and that any changes in the balances between the bankrupts and the petitioners would be duly noted on the bankrupts' books. In these circumstances, which are not and cannot be denied, it is mere folly to insist that the National City Bank and Goldman, Sachs & Co.

went out of their way to point out to the bankrupts, also a banking house, that in making up their books of account, the bankrupt should not forget to credit the particular account of petitioners with the sums for which checks were delivered to the bankrupts by said banks. We cannot believe that respondent is in earnest in urging upon this court that either petitioners or said New York banks were ever concerned with or cared anything at all about the bookkeeping system of the bankrupts. We submit that respondent in its anxiety to avoid the settled banking technical and legal meaning of said restrictive expressions, is attempting to present a strained and unnatural construction of these expressions, a construction entirely unsupported by the facts and the course of dealing between the bankrupts and petitioners.

Respondent insists that the adoption in respect to the $1,294 check of the National City Bank of the construction urged by petitioners, would mean that the very bank, instructed to pay money to the bankrupts for petitioners, constituted the bankrupts agents of the petitioners to collect these very same moneys from the bank itself.

Far from being unnatural, the above result is a matter of everyday practice with banks in New York and throughout the country. Moreover, this construction is not only warranted by the check of the National City Bank, but the text of said check clearly shows that such was the intention of said bank. We refer the court to the record (R., 28, 30), where it appears that the check of the City Bank had on it the words, "Payable only through New York Clearing House." How the bankrupts could have received actual payments on said checks unless they collected the same from the City Bank through the New York Clearing House is a matter which we are content to leave to the respondent to explain.

The court will bear in mind that the check for $15,000 *was not a cashier's check.* It was an ordinary check drawn by Goldman, Sachs & Co. upon their current account with the Bank of America (R., 31). Hence, it was not to be collected from the same banking institution which drew it, and, consequently, the whole argument of the respondent on that particular question is entirely inapplicable to it.

The check for $1,294 was drawn by the National City Bank of New York to the order of the bankrupts, also New York bankers and stated on its face that it was payable "favor N. Latzko and A. Popper, Budapest." The check for $15,000 was drawn on the Bank of America by Goldman, Sachs & Company, private bankers, upon instruction of Julius Baer & Company, also bankers, at Zurich, Switzerland; was delivered to the bankrupts, another private banking house in New York, for the benefit of the petitioners, private bankers of Budapest, Hungary (R., 31). In other words, we have to deal with banking transactions between bankers who *must* be presumed to use banking terms in the sense usually attributed to them by banking usage and law. It is a case of experts in their particular line of business, employing technical nomenclature in regard to a technical transaction in their branch of business. It is submitted that the law is well settled in such case that the court must apply the settled technical and legal meaning of the expressions "account of" and "favor of" to such words, as were used herein by Goldman, Sachs & Company and the National City Bank when delivering the checks in question to the bankrupts.

Even if respondent had attempted to introduce any evidence on the hearing before the Special Master as to the meaning of said expressions, such

evidence should have been rejected. In *White* v. *Miners' National Bank,* 102 U. S., 658, this court said in regard to the expression "for account of":

> "If this be a sound view of the legal effect of the written indorsement, *neither parol proof nor custom can be received to contradict it.*"

In New York, the rule is similar:

> "Independent of other objections to the evidence offered, to show the meaning of the words 'free from average', it is sufficient to say that *evidence of such a character is not admissible, for the purpose of attaching to those words, when forming part of a written contract, a meaning in conflict with, or variant from that given to them by adjudged cases;* by which their meaning, in precisely such contracts has been determined and was a point in judgment."
>
> *Bargett* v. *Orient Mutual Insurance Co.,* 3 Bos., 385, 397.

And in *Shore* v. *Wilson, 9 Clark & Fin.,* 355, the House of Lords said at p. 514:

> "But, subject to these qualifications, *wherever the words employed bear a definite known meaning, and are capable of being applied according to their plain and ordinary meaning, no evidence is, in my opinion, admissible to show that the party intended to use them in a more extended or in a more qualified sense;* for, otherwise, every man's will and intention, however expressed, would be liable to be defeated. * * *"

In support of our contention that the expression "account of" or "favor of" should be construed in accordance with their settled legal and technical meaning, the following authorities are relied upon:

> "But if no such intention to use the words in any particular or extraordinary sense appears upon the face of the writing, it then becomes the duty of the court to construe the words according to their plain, general, ordinary meaning, subject to certain qualifications. *First, if the words used be technical terms of law, the court must take them according to their strict legal acceptation, although in general and ordinary use they may have acquired a more extensive or a more limited sense.*"
>
> *Shaw v. Wilson*, 9 Clark & Fin., 355.

> "*It may be further laid down as equally well settled, that if parties in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense.*"
>
> *Findlay's Executors v. Findlay*, 11 Grant. (Pa.), 439.

> "*If it is a word of technical or legal character, it must be construed according to its technical or legal meaning.*"
>
> *Hall & Co. v. Culligan*, 91 U. S. Chan. Dec., 120, 123.

> "This being a written contract between two parties, the construction of it belongs to the court; and the court must adopt the usual rules, and construe the provisos or conditions,

as well as the other parts of the instrument, according to the ordinary meaning of the language used; except that terms of art, or technical words, must be understood in their proper sense, unless the context controls or alters their meaning."

Clift v. Schwabe, 3 C. B., 437, 470.

"So, also, if it appears that the term used has an established meaning among those engaged in the business to which the contract has reference, and unless it be given that meaning, is indefinite and equivocal, it should be treated, in interpreting the contract, as used according to that understanding * * *."

Metropolitan Exhibition Co. v. Ewing, 42 Fed., 198, 202.

"Where are words in deeds or in notes and other instruments which have a technical meaning, and are employed accordingly, but language in deeds or notes, or other instruments, not technical, must be taken in its ordinary and usual sense."

Bradshaw v. Bradbury, 44 Me., 356, 358, 359.

"The rule is well settled that, in ascertaining the meaning of words in a deed or other written instrument, technical words must be given their technical meaning and significance. Mitchell v. Mitchell, 2 Gill., 230."

Maryland Coal Co. v. Cumberland & Pa. R. R. Co., 62 Md., 105, 108.

In view of the settled legal and technical restrictive meaning of expressions "favor of" and "account of" as applied to negotiable instruments,

and of the fact that the record is completely bare of any evidence even hinting at the contrary intention of all the parties concerned herein to use said expression in a sense other than that warranted by the settled legal and technical restrictive meaning thereof, there is no ground whatever upon which a decision may be predicated ascribing to these New York banks and bankers an intention to specifically direct the bankrupts to perform on their books what the respondent itself designates as "an every day transaction."

POINT TWO.

White v. Miners' National Bank, has been considered an authority for the proper meaning of the words "account of" for half a century, and is in accordance with earlier authorities.

Respondent's attempted distinctions of the doctrine in White case from the facts at bar were properly rejected by the Circuit Court of Appeals.

Prior to discussing respondent's main objection to the doctrine announced by this court in *White v. Miners' National Bank*, 182 U. S., 658, to wit, that insofar as the opinion therein affects the case at bar it was merely a *dictum*, we will answer some of the minor objections to the applicability of the White case to the checks herein involved.

Respondent insists that the doctrine of the White case is limited in its application to such restrictive indorsements on negotiable instruments as appear on the back thereof, and does not apply to indorsements appearing elsewhere. This contention

is untenable, because the place where the indorsement of a negotiable instrument appears is entirely immaterial. An indorsement does not cease to be such because it happens to be written either on the front of a negotiable instrument or in a memorandum accompanying the same. The following authorities leave no room for any doubt on this point:

Richards v. *Warring*, 29 Barb. (N. Y.), 42, 43;
Bank of America v. *Wingdell*, 187 N. Y., 115, 120;
Haines v. *Dubois*, 39 N. J. L., 259, 260, 262;
Farmers' Trust Co. v. *Schrunit*, 82 Ill. A., 267, 273, 274;
Crowdery v. *Johnson*, 69 Vt., 595, 597.

Respondent's next objection is based on the fact that the negotiable instrument involved in the *Klein* case was a private paper and not a bank paper. It insists that because one of the checks at bar was a cashier's check (which it will be remembered was payable only through the New York Clearing House) it should be treated as such. The court will bear in mind that the larger check here, to wit, the check of Goldman, Sachs & Co. for $15,000 is not a cashier's check, but an ordinary private check. A bank cashier's check is nothing but a negotiable instrument in the nature of an accepted bill of exchange drawn on itself.

Seisdedt v. *Marine State Bank*, 11 N. D., 89, 95;
Henry v. *Allen*, 151 N. Y., 1, 22;
Bullock v. *Second National Bank*, 147 N. Y. Supp., 167, 169.

Even if we assume that the check of a bank's cashier is equivalent to a certified check, the law is against the respondent's contention. It has been repeatedly held that even certified checks are not cash and are subject to ordinary rules of collection, prior to which such checks do not extinguish the debt and are not equivalent to a payment in cash.

Dike v. *Drexel*, 11 App. Div., 77, 83;
Davenport v. *Palmer*, 152 App. Div., 761, 763.

Further objection of the respondent is based on the fact that bankrupts credited on their books the account of petitioner's with the amount of the checks at bar prior to their collection.

The mere fact that the bank with whom the depositor has a current checking account credits a depositor on its books with the amount of the anticipated proceeds of the checks deposited with it for collection, prior to the actual collection thereof, in no way affects the legal title of the depositor to such checks. In New York the matter is regulated by statute, which provides that unless the bank gives value for the check it does not become the owner thereof (Negotiable Instruments Law, Laws 1909, Chapter 43, Section 91). As the New York courts recently held:

> "It is not the absolute credit given in the case of a purchase, *but a mere bookkeeping credit for convenience.*"
>
> *First National Bank* v. *Stumpf*, 169 N. Y. Supp., 227, 229, affirmed in 185 App. Div., 906 and 227 N. Y., 659.

This court in *Thompson* v. *Sioux Falls National Bank*, 150 U. S., 230, said on page 233:

> "The mere credit of a check upon the books of a bank, which may be cancelled at any time, does not make the bank a *bona fide* purchaser for value."

Similarly, in *St. Louis and San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 556, this court said on page 576:

> "The draft was entered at its full value, which indicated that it was not discounted, *but credited for convenience and in anticipation of its payment.*"

The following authorities are to the same effect:

Levi v. *National Bank of Missouri*, 5 Dill., 104, 110, 111;
Citizens State Bank v. *Coules*, 189 N. Y., 346, 349;
Merchants National Bank v. *Santa Maria Sugar Co.*, 162 App. Div., 248, 252;
Stein v. *Empire Trust Co.*, 148 App. Div., 850, 853;
Albany County Bank v. *Peoples Ice Co.*, 92 App. Div., 87;
Jones v. *Kilbreth*, 39 Ore., 91, 101, 111.

Again, the doctrine of the *White* case is in no way affected by the fact that the owner of the checks restrictively endorsed, happens to have a current checking account with the bank to which such restrictive checks are delivered by him for collection. Even if it is assumed that instructions given in the case at bar to the bankrupts that the deposit of petitioner's checks was made for "account of" or "credit of," amount in law and under the facts herein to the delivery of said checks to

the bankrupts "for collection", then it becomes clear that the alleged distinction of the respondent is without merit.

The only difference resulting from the fact that in the *White* case the owner of the check did not have a current checking account with the depositary and that the petitioners had such an account with the bankrupts is that in the *White* case the defendant bank *would not* have acquired the title to the proceeds of the checks *even after their collection*, but that the bankrupts in the case at bar *would* have acquired the title to the proceeds of petitioners' checks, *if they had collected said checks prior to the filing of their petition in bankruptcy.*

This view is supported by an unbroken line of authorities.

Re Jarmulowsky, 249 Fed., 319, 320, 321 and 322.

Re Havens, 8 Benedl., 309, 310, 311.

Levi v. *National Bank of Missouri*, 5 Dill., 104, 106, 109.

Manufacturers National Bank v. *Continental Bank*, 148, Mass., 553, 558, 559.

First National Bank v. *First National Bank*, 76 Ind., 561, 569, 570.

Morse on Banking (5th Ed.), Section 567.

In *American National Bank* v. *Miller*, 229 U. S., 517, private banker Plant delivered his personal check drawn on the American National Bank of Nashville, Tenn., to the First National Bank of Macon, Ga., in payment of a debt from him to the Macon Bank. The Macon Bank had an account with the Nashville Bank, indorsed Plant's check generally and sent it to the Nashville bank. On the day said check was received by the Nashville

bank and credited to the account of the Macon Bank with it, a petition in bankruptcy was filed against Plant in Macon. The Nashville bank attempted to charge the amount of this check off the account of the Macon Bank with it, after it learned of Plant's bankruptcy. This court held that the Nashville Bank could not do so and stated the reason for such decision thus (at p. 520):

> "There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but *when such bank performs the dual function of collecting and crediting the transaction is closed*, and in the absence of fraud or mutual mistake, is equivalent to payment in usual course. *First National Bank* v. *Burkhardt*, 100 U. S., 689. In the present case it was as though an officer of the Macon bank had presented the check to the teller of the Nashville bank, and on receiving the money, had paid it back over the counter in deposit to the credit of the Macon bank."

At the time the petition in bankruptcy was filed herein against the bankrupts, they had not performed "the dual function of collection and crediting." The facts in the case at bar are stronger than in the *Siller case* (*supra*), since in that case the check was drawn on the *self-same* bank wherein the depositor had a checking account, while in the case at bar all of the checks were drawn on banks *other* than that wherein petitioners had their account.

Respondent contends that the opinion of this court in the *White* case, insofar as it discussed the interpretation of the expression "*for account of*" was merely a *dictum*. Casual examination of the

opinion suffices to refute any such implication. This court expressly said at page 660:

> "Because of the words 'for account of Miners' National Bank of Georgetown, Colorado,' in this indorsement by Brownell, as president of the bank, the Circuit Court ruled that no obligation arose out of the transaction on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. *And this is the principal question which we are to decide.* * * *"

For over a half a century, the *White* case has been an authority for the proposition stated by us *supra*. It has never been doubted, distinguished or overruled. It has been repeatedly relied on by this court in its later decisions and by the highest appellate courts in many States as authority upon the question of restrictive indorsement.

Thus, in *Commercial National Bank* v. *Armstrong*, 148 U. S., 57, this court said:

> "And in *White* v. *Miners' National Bank of Georgetown*, 102 U. S., 658, where an indorsement was 'for account,' the same justice, speaking of the indorsement, said:
>
> 'It does not purport to transfer the title of the paper or the ownership of the money when received.'
>
> The plaintiff then, as principal, could unquestionably have controlled the paper at any time before its payment and this control extended to such time as the money was received by its agent, the Fidelity."

Again, in *Old National Bank* v. *German-American National Bank*, 155 U. S., 556, 562, this court

cited the *White* case as authority on the question of restrictive indorsements.

In *Bank of Metropolis* v. *First National Bank*, 19 Fed., 301, Wallace, J., after referring to indorsement 'for collection' said:

> "In *First National Bank* v. *Pennsylvania Co. Bank*, 3 Fed. Rep., 257, paper was indorsed 'pay to the order of Hetherington & Co. on account of First National Bank, Chicago,' and it was held to be such a restrictive indorsement as to charge subsequent holders with notice that the indorser had not transferred title to the paper, or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the paper seems to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other. Other authorities in support of this conclusion are: *Sweeney* v. *Easter*, 1 Wall., 167; *White* v. *National Bank*, 102 U. S., 658; *Lee* v. *Chillicothe Bank*, 1 Bond., 389; *Blaine* v. *Bourne*, 11 R. I., 119; *Claffin* v. *Wilson*, 57 Iowa, 15."

As late as 1925 Wolverton, J., in *Nyassa-Arcadia Drainage District* v. *First National Bank*, 3 Fed. (2nd), 648, cited the *White* case in its customary meaning:

> "Nor does the indorsement 'for account' purport to transfer the title of the plaintiff or the ownership of the money when received. *White* v. *National Bank*."

In *Tyson* v. *Western Nat. Bank*, 25 Atl., 520, 521, the Court of Appeals of Maryland relied on the *White* case in its conventional sense.

"In the present case the check and draft were deposited with Nicholson & Sons with an indorsement in these words: 'For collection for account of Tyson & Rawls.' This indorsement was not adequate to pass to Nicholson & Sons the title to these papers. It has been so held by this court, and the Supreme Court of the United States and other courts. * * *

In *White* v. *Bank*, 102 U. S., 658, it was said: 'The plain meaning of it (the indorsement) is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

In *Freiberg* v. *Stoddard*, 28 Atl., IIII, the Supreme Court of Pennsylvania considered the *White* case as holding that "for account of" implied restriction on the negotiability of an instrument:

"An indorsement for collection is restrictive, and carries no power of sale with it. In such case, the indorsee is a mere agent for an indorser and such indorsement has been said not to amount to a transfer of title. So an indorsement 'for collection for my account,' or 'for account of it,' is restrictive and does not pass the title, or the right to proceeds, of the instrument. The indorsee takes the instrument as agent or the trustee for the indorser; and if he disposes of it for his own use, the indorser may recover from the purchaser the amount collected on it, or he may recover the

> bill itself in an action of trover. By such restrictive indorsement the indorsee takes the instrument, subject to the trust created. *Rand Com. Paper,* Par. 726; *Daniel Neg. Inst.,* Par. 698; *White* v. *Bank,* 102 U. S., 658; *Sweeney* v. *Easter,* 1 Wall., 166; *Bank* v. *Gregg,* 79 Pa. St., 384; *Hackett* v. *Reynolds,* 114 Pa. St., 328."

In *U. S. National Bank* v. *Geer,* 55 Neb., 462, 464, 465, the highest court of Nebraska said:

> "In *First National Bank of Chicago* v. *Reno County Bank,* 3 Fed. Rep., 257, it was distinctly decided that an endorsement of a bill of exchange directing the drawee to pay to another 'on account of the endorser,' or 'for collection' is a restrictive endorsement carrying with it notice that the endorser did not thereby part with title to the paper or to its proceeds when collected. The same effect are *Beal* v. *City of Somerville,* 50 Fed. Rep., 647; *Sweeney* v. *Easter,* 68 U. S., 166; *Balbach* v. *Freylinghuysen,* 15 Fed. Rep., 675; * * * *White* v. *Miners' Nat. Bank,* 102 U. S., 658."

There are numerous authorities preceding the decision of the United States Supreme Court in the *White* case, uniformly holding that words "for account of " restrict the negotiability of commercial paper.

Thus, in *Treuttell* v. *Barandon,* 8 Taut., 100, the court held that an indorsement "pay to J. or order for account of N." constituted a restrictive indorsement. The court remarked that such indorsement has been known to commerce and law for many years and has always been considered as implying restriction of negotiability.

In *Lee* v. *Chillicothe Branch of State Bank,* 15 Fed. Cas. (Nos. 8186, 8187) 150, 151, 152, both the District and the Circuit Courts discussed at length various restrictive indorsements, including words "for account of" and stated that:

> "It imports that indorsee receives the bill for a special purpose, and as a trustee for the party indorsing; and is equivalent to direct notice to every customer to whom it may be afterwards presented, that he has no right to dispose as his own property."

In *First National Bank* v. *Lynn,* 132 Mass., 227, 228, the deposit was: "for account of First National Bank of Lynn, Mass." The court said:

> "The words 'for account of' merely indicate the relations which the two banks hold to each other in the transaction. At the most, they show that the note was indorsed to the bank in Boston, not upon a valuable consideration, but for collection."

In *Hackett* v. *Reynolds,* 114 Pa., 328, the indorsement was "Pay S. H. Lamberton, Cashier, or order, for account, Penn. Bank, Pittsburgh. G. L. Reiber, Cashier," and the court said of Reynolds, Lamberton & Co., that

> "They had an undoubted right to treat the Penn. Bank as the actual owner of the note."

In *Leary* v. *Blanchard,* 48 Me., 269, the deposit was "for account of the Atlas Mutual Insurance Co." The court stated at page 274:

> "The indorsement, by its terms, was restricted, and the ordinary and popular sense

cannot be changed by parol evidence. 1 Greel. Ev., Par. 295."

In *First Nat. Bank of Belmont* v. *First Natl. Bank of Barnesville,* 58 Oh. St., 207, the court said at p. 215:

"* * * when, the indorsement is 'for collection' or 'for account of' it is notice to the drawee bank that the bank presenting the check for payment is not the owner but only the agent of the owner, and that the money is to be remitted to the owner, back through the same channel through which the check or bill was received by the collecting bank."

In *First National Bank of Chicago* v. *Reno County Bank,* 3 Fed. Rep., the court said, at page 261:

"July 29th, 1878. Pay to the order of W. Hetherington & Co., Atchison. Account of First National Bank, Chicago. L. J. Cage, Cashier.

This was clearly a restrictive indorsement, the effect of which was to restrict the further negotiability of the bills and to give notice to the defendant that the plaintiff did not thereby give title to them or to their proceeds, when collected. 1 Daniell on Negotiable Instruments, Par. 698, and cases cited."

In order to succeed on this appeal, it is not sufficient for respondent to persuade this court that the words "account of" indicated mere instruction by the depositors and third parties as to the bookkeeping system of the bankrupts, but also that the proceeds of the two checks in question were intended to be paid to the bankrupts, not for the bene-

fit of petitioners, *but for the benefit and the beneficial use of th bankrupts themselves.* Nothing short of such proof would be sufficient to change the capacity in which the bankrupts acted in the case at bar, from that of agents and trustees for petitioners, to that of owners of the proceeds of the checks in question.

In *Lee* v. *Chillicothe Branch Bank* (No. 8186), 15 Fed. Cas., The District Court said, at pages 150-151:

> "Without stopping to analyze the many cases referred to, in which endorsements have been held to be restrictive in their character, as suspending the further negotiability of commercial paper, the following instances may be briefly stated: '*to pay to my use*' 'pay to A only', 'pay the contents to the use of B only', '*pay the money to my servant for my use,*' 'carry this bill to the credit of A,' 'the within must be credited to L. H. value in account,' 'pay to J. P., or order for account of T. M. W.' *Chitt. Bills,* 176, 177; *Pyles Bills,* 121 (Marginal paging); *Edw. Bills & N.,* 277, 278; Stor. Bills, Par. 211; *2 Burrows,* 1227; Doug., 637; 8 *Taunt.,* 100; 15 *E. C. L.,* 319; 3 *Mass.,* 227; 5 *Mass.,* 544."

On appeal the Circuit Court said (No. 8187; 15 Fed. Cas.), at page 152:

> "Whether an endorsement be restrictive or not, depends upon the intention of the parties as expressed 'Pay to J. S. only,' '*pay to A. for my account*' '*pay the contents of my use*'; 'pay the contents to the use of a third person'; '*pay to A. B., or order, for my use,*' '*pay to A. B. for my account*'; 'pay the within to A. B. for the use of C. D.'; '*pay the money to my use*';

'pay the money to my servant for my use.'— these are specimens from cases where the endorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of the restriction, the negotiability of the bill ceases. * * *"

"'Pay J. H. for my use *or for my account,'* shows the intent of the endorser, and is barely an authority to receive the money upon it. *It imports that endorsee receives the bill for a special purpose, and as a trustee for the party endorsing;* and is equivalent to direct notice to every person to whom it may be afterwards presented, that he has not a right to dispose of it as his own property." *Edw. Bills & N.*, 277.

There is no mystery whatsoever attached to the words "account of" and "favor of". In fact, it is submitted, that irrespective of the words used (of which there may be an endless variety, as shown in the two quotations from *Lee* v. *Chillicothe Branch Bank, supra*), whenever a third party attempts to make a payment otherwise than in actual cash currency not to the creditor directly, but to an intermediary (in this case the bankrupts) who is to take the proceeds of whatever value is delivered to him and to pay them to the creditor either directly or by crediting the creditor's account with the intermediary, the intermediary acts in the transaction as and will be deemed in law to be, prior to the receipt of the proceeds by him, the agent or the trustee for the creditor.

Morse on Banking (5th Ed.), Section 567;
Montague v. *Pacific Bank,* 81 Fed., 602;
Woodhouse v. *Crandall,* 197 Ill., 104, 109;

Star Cutter Co. v. *Smith,* 37 Ill. App., 212;
People's National Bank v. *Wheeler,* 21 Okla., 387; 96 Pac., 619.

In accordance with the above doctrine, Section 66 of the Negotiable Instruments Law of New York provides:

> "An indorsement is restrictive, which either: (3) Vests the title in the indorsee in trust for *or to the use of some other person.*"

Similarly, in *White* v. *Miners' National Bank* (supra), the court, referring to the indorsement "for account of," said:

> "The plain meaning of it is, that the acceptor of the draft is to pay to the indorsee *for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper* or the ownership of the money, when received."

Unless respondent can show that the intention of the New York banks was to transfer the beneficial interest in the checks in question and to pay the proceeds thereof *to the use of the bankrupts,* it fails in its attempt to prove that title to said checks was at the time the petition in bankruptcy herein was filed in the bankrupts and not in petitioners.

POINT THREE.

The Circuit Court of Appeals erred in holding that the memorandum accompanying the check for $15,000 and stating that the same was delivered to the bankrupts "for account of" petitioners, did not constitute a part of the contract controlling the title of the parties to said check.

It is elementary that the general rules governing the construction of all contracts apply equally to negotiable instruments, so far as their construction is concerned. In particular, a negotiable instrument must be construed in the light of a separate contemporaneous oral or written agreement as forming one single contract with it.

> *Thompson* v. *Riggs*, 5 Wall., 663, 678;
> 8 *Corpus Juris*, 85.

In the case at bar, the Circuit Court of Appeals said:

> "The important fact is that this $15,000 check is on its face a straight unrestricted cashier's check payable to the order of the bankrupts. The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. *The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners.* This they did as the agents of the petitioners. *The legal effect of the transaction was the same as though the petitioners had themselves deposited the check*

'for our account' with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account" (R., 84, 85).

In the case at bar, the District Court held that:

> "In respect to the last two checks, it is true that 'for account of' ordinarily means for collection and that *an agency may be indicated by letter of instruction or by a notation as well as by the restrictive endorsement. Boone County National Bank* v. *Latimer,* 67 Fed., 27" (R., 39).

The holding of the District Court herein and in the *Latimer* case, *supra,* is in accordance with numerous decisions of the State Courts of last resort throughout the United States. As the court said in *Re State Bank,* 56 Minn., 119, 123:

> *"There can be no doubt* that if a draft or other paper is delivered to a bank for collection, the mere fact that the indorsement of the owner is unrestricted will not, as between him and the bank, make the latter the owner of the property."

It has long been established that the intention of the parties delivering a negotiable instrument, to part or not to part with title to it, may be evidenced by an *oral* agreement, or an understanding to that effect.

> *Matter of Marine,* 169 A. D., 65, 67;
> *Turney* v. *Guthrie,* 15 N. Y. Sup., 679, 680;

Barker v. *Prentice*, 6 Mass., 430, 433, 434;
German Fire Insurance Co. v. *Kimble*,
66 Mo. App., 370, 371, 373.

With still greater force, the above rule applies to the case of *written* instructions accompanying negotiable instruments bearing no restrictive indorsements on their face. The following authorities uniformly support the rule of law, that memoranda accompanying negotiable instruments should be construed together and form a part of one and the same contract, evidenced by the negotiable instrument itself and the memorandum accompanying it:

"Sec. 208. *Instructions accompanying a deposit and coming from the proper authority, must be carefully attended to.* When the depositor orders his money to be put on one of his accounts, or to be applied to take up a particular check or note, or to be transmitted to a certain person, or *whatever special direction he may give, the bank must obey if it receives the deposit at all.*"

Morse on Banks & Banking (5th ed.), page 409.

"*It is true that the paper came to the plaintiff's hands by general indorsement from Ives & Son, but the indorsement and the letter of advice in transmission must be read together, and so reading them the legal effect was to make the indorsement restrictive and the same in character as if the contents of the letter had been incorporated in the indorsement.* It follows, therefore, that upon the facts found, and as to which there was little if any dispute, the

plaintiff never acquired title to the bill. It was an agent merely for its collection. It was only in that character that Ives & Son received the paper from the drawer, and that was the only title that was conferred upon the plaintiff."

Bank of America v. *Waydell,* 187 N. Y., 115, 120.

"While the deposit of a bill or check in the ordinary course of business, the depositor receiving a credit against which he can draw, has the effect of transferring the title (*Briggs* v. *Central Nat. Bank of N. Y.*, 89 N. Y., 182; *Metropolitan Nat. Bank* v. *Lloyd,* 90 id., 530; *Cragie* v. *Hadley,* 99 id., 131). I do not think that was the effect of the original deposit involved in this case. *The words on the deposit slip must be read into the contract.*"

King v. *Bowling Green Trust Co.*, 145 A. D., 398-401.

"A part of this lumber was sold, and a draft was drawn in payment of the same, which draft was indorsed by Cochran & Co., to plaintiff, Long, and forwarded to him at Chicago, Ill., who, by letter, sent the same to the Bank of Commerce for collection, inclosed in the following letter: 'Chicago, July 24, 1926. Bank of Commerce, Louisville: Please find John L. Cochran & Co. check on your bank for $500, which please place to my credit; also J. L. Cochran & Co. draft, 30 days, after date July 5th, on Rodgers & Co., Peoria, Ill., for $309.81, which please collect and credit. Very truly yours, Jno. S. Long.' * * *

We cannot concur with this reasoning of the

Judge of a lower court, and, upon carefully examining the evidence in whole case, we fail to find sufficient evidence to support the judgment, and are of opinion that the court erred in refusing appellant a new trial."

Long v. *Bank of Commerce,* 38 S. W., 886, 887.

"The instruction which accompanied the draft when received by the bank was as follows: 'Inclosed herein please find our draft for collection, which we have made on the San Antonio Banking Association of your City. Kindly give this your immediate attention, and oblige, your truly, Townsend, Hostetter & Co.' * * * *There is nothing from which could be implied an authority for the bank to hold the money and treat it as a deposit."*

Hunt v. *Townsend,* 26 S. W., 310, 311.

"The draft on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce, *was coupled with instructions* from the latter bank for specific application of the proceeds of the draft where collected. *These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor, would result.* * * *."

Hutchinson v. *National Bank of Commerce,* 145 Ala., 196, 201.

Finally, the transaction in the case at bar took place entirely within the State of New York. It must be deemed to be covered by the law of New

York concerning negotiable instruments. Section 35, of the New York Negotiable Instruments Law, provides as follows:

> "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. * * * the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, *and not for the purpose of transferring the property in the instrument.*"

This appeal, based upon the reclamation proceeding of petitioners, charges the respondent as trustee in bankruptcy with all the equities, which petitioners had against the bankrupts. That, of course, includes the notice restricting the negotiability of the check for $15,000 contained in the memorandum accompanying its delivery by Goldman, Sachs & Co. to the bankrupts.

Since the American Exchange National Bank was merely a gratuitous holder of said check and the proceeds thereof, having parted with no value therefor, the fact that it collected said check for the bankrupts herein has no bearing whatsoever upon the title to the proceeds of said check as between the bankrupts and petitioners. Furthermore, this question becomes merely academic in this case because, as respondent concedes, the full amount of the proceeds of said check was received by the trustee (Point Seven, *infra*).

POINT FOUR.

The Circuit Court of Appeals erred in holding that where a negotiable instrument indorsed in blank is delivered by the depositor to his bank with restrictive instructions and the bank deposits said negotiable instrument with another bank but omits to forward said instructions, the depositor is thereby divested of title to said instrument.

The Circuit Court of Appeals in its opinion in the case at bar stated:

> "The legal effect of the transaction was the same as though the petitioners had themselves deposited the check '*for our account*' with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account. *That transaction made the American Exchange National Bank the owner of the check on June* 15 *and the proceeds when collected on June* 16*th belonged not to the petitioners or to the bankrupts but to the bank which was the owner of the check when it was collected.* We think the transaction is governed by the rule laid down in the *Burton* case, and that the relation between the petitioners and the bankrupts on June 15, when this check was credited by the latters to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners * * *" (R., 84, 85).

It is clear from the facts herein that petitioners completely traced the proceeds of the said check for $15,000 to the securities of the bankrupts returned by the American Exchange National Bank to the trustee for the bankrupt (see Point Seven hereafter). Hence no question arises as to any equities on the part of the American Exchange National Bank to the proceeds of said check for $15,000. It therefore follows that the American Exchange National Bank was merely a gratuitous holder of said proceeds of said check for $15,000 without having parted with any consideration past or present therefor, and the trustee stands in the shoes not of the American Exchange National Bank but in those of the bankrupts.

The doctrine that the Circuit Court of Appeals intended to apply to the case at bar is unsound and was rejected in other cases by the same Circuit Court and by other State and Federal Courts.

A deposit accompanied by instruments establishing between the depositor and his bank the relationship of principal and agent, thereby creates a confidential relationship between them, and the proceeds of such deposit are trust moneys, the title to which remains in the depositor so long as he is able to trace the same.

When there is a relationship of principal and agent between the depositor and the bank, the proceeds of negotiable instruments received by the agent are deemed to be held by the agent *in trust* for the principal.

Central National Bank v. *Connecticut Mutual Life Ins. Co.*, 104 U. S., 54, 67, 70, 71;

VanAlen v. *American National Bank*, 52 N. Y., 104;

Roca v. *Byrne*, 145 N. Y., 182, 187;

Farmers & Mechanics National Bank v. *King*, 57 Pa., 202, 205;
Merrill v. *Bank of Norfolk*, 19 Pick. (Mass.), 32;
Hutchinson v. *National Bank of Commerce*, 41 So., 143, 144;
Hewitt v. *Hayes*, 205 Mass., 356, 363.

The principle of the above cases has been invariably applied to banking transactions and constitutes an integral part of the banking law of this country.

> "*Instructions. If the customer gives any instructions or directions* concerning any item or the method which is to be pursued in collecting or protesting the paper, *the bank receiving the paper is bound to forward such instructions and directions to its agent or correspondent.*"
>
> *Morse on Banks & Banking* (5th Ed.), page 458.

The Circuit Court of Appeals for the Second Circuit applied this doctrine in the case *In re Berry*, 147 Fed., 208, 210, 211, where it said:

> "Stripped of all complications and entanglements we have this raked fact that Raborg and Manice by mistake paid Berry & Co., $1,500 which they did not owe and which Berry & Co. could not have retained without losing the respect of every honorable business man. * * *
>
> It is unnecessary to enter further into details of the bank's transactions subsequent to the failure it is enough to say that as the final result of the bank's liquidation of the account $6,310.41 was delivered to the trustees in

> bankruptcy. But for the mistake of Raborg & Manice this sum would have been $4,810.31 which is all the bankrupts' creditors are entitled to. The $1,500 should be paid by the trustees to Raborg & Manice, its lawful owners."

In the case at bar the Circuit Court of Appeals held in regard to the check for $15,000.00:

> "The proceeds when collected on June 15, belonged not to * * * bankrupts, but to the bank which was the owner of the check when it was collected" (R., 253).

In *Berry* case, *supra,* the same court held that the bankrupts had no title to the proceeds of a check deposited by them to their current checking account with their bank prior to the filing of the petition in bankruptcy. It did not hold in the *Berry* case that the bank of the bankrupts acquired title to said proceeds as it did in the case at bar.

Similarly, in *Titlow* v. *McCormick*, 236 Fed., 209, the bankrupt bank received for the collection certain school district warrants, which it collected through *three* different correspondent banks. At the time of the bankruptcy, it had a credit balance with *one* of these banks. The Circuit Court of Appeals for the Ninth Circuit said at page 215:

> "The record does show, however, that such deposit of the United States National Bank of Centralia with the Bank of California of Tacoma was not entirely dissipated, but there remained of such deposit at the time of the suspension of the former the sum of $1,585.36, which passed into the hands of the receiver of its assets, and to which only the appellee is, in

our opinion, entitled to a preference over the general creditors of the insolvent bank."

To the same effect is *In re Royca's Estate,* 143 Fed., 182, where the court said at pages 183, 184:

> "It appears from the record that at the time of adjudication the bankrupt had on deposit in a bank $390.70, which has since come into possession of the trustee of his estate. The deposit included $120, which the petitioner had theretofore intrusted to the bankrupt for safe keeping. * * * The bankrupt did not keep the money separately, but made a deposit thereof in a bank in which he had other money on deposit, so that it became mingled with other money held by the bank subject to his check, and the balance to his credit exceeded the amount received from the petitioner, at all times continuously from the date of the deposit until it was withdrawn by the trustee, who now has it in custody. * * * In this case, although the money cannot be specifically identified, the fund is clearly proved to have been enlarged by mingling trust money with other money, and the equitable right of the petitioner to reclaim the amount equivalent to the amount intrusted is clear. *San Diego County* v. *Cal. Nat. Bank,* 52 Fed., 59; *Massey* v. *Fisher,* 62 Fed., 958; *City of Spokane* v. *First Nat. Bank,* 68 Fed., 982; *Bradenburg on Bankruptcy* (3rd Ed.), page 768."

Still better illustrations of the principle, that the depositor's bank cannot change the nature of the deposit by mere failure to transmit to the collecting bank specific instructions given to it by its depositor are the four following cases:

In *Drovers' Nat. Bank* v. *O'Hare,* 119 Ill., 646, customers of the Drovers' Bank made a deposit stating that it was for the credit of the Henry Bank "for the use of M. J. O'Hare."

The Drovers' Bank sent a check for the amount of said deposit to the Northwestern National Bank, stating that the said amount was for the credit of the Henry Bank but omitting to mention O'Hare's interest. The Henry Bank failed, before O'Hare was paid, and the Northwestern Bank applied the amount of the check of the Drover's Bank to wipe out the indebtedness of the Henry Bank to it.

The court said:

> "But if the Henry Bank must, from the character given the funds in the hands of the appellant, account to the appellee therefor, it was the duty of appellant to give notice to any intermediary it might select, of the trust character impressed upon the funds, and not permit it to be carried to the general account of the trustee, to be applied upon its debts (*Perry on Trusts,* 406, 443, 444, and authorities cited). * * *
>
> *In what is claimed as an attempt to transfer the funds to the Northwestern National Bank, appellant withheld all indications of the trust character of the funds, or that it was other than money going to the general account of Henry Bank. To this appellee in nowise consented, and appellant stands in no better position that if it had retained the money in its custody."*

The above decision was followed in the *Union Stock Yards Nat. Bank* v. *Dumond,* 33 Ill. App.,

102, where the check was deposited "for the use of George W. Dumond", and the court said at page 103:

> *"Here the fault of the Stock Yards Bank was in depositing the money of Dumond with the Merchants' National Bank, without preserving its identity in pursuance of instructions which were entirely plain. Having accepted the money with the instructions, it should have pursued the course marked for it."*

Again, in *Hutchinson* v. *National Bank of Commerce*, 41 So., 143, the court said on page 144:

> *"The draft* on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce was coupled with instructions from the latter bank for specific application of the proceeds of the draft when collected. *These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor would result; and the collecting bank could not without the consent of the initial bank and in violation of the latter's instructions, alter or change the relation so created by any subsequent conduct or action of its own in dealing with the proceeds of the draft when collected."*

Finally, in *Beaver Boards Co.* v. *Imbrie & Co.*, 282 Fed., 655, 656, the court held that:

> "The check deposited with the broker here was accompanied by the express written stipulation: 'Which you will hold *for my account* against any purchases of stock on my order,

same to be held by you until the account is closed.' * * * *Depositing the money in the general account of the broker did not alter its character as between Imbrie & Co. and Lynch. Central Nat. Bank* v. *Conn. Mutual Ins. Co.*, 104 U. S., 54."

POINT FIVE.

This court in Burton v. United States merely intended to approve the New York rule but not to go beyond it.

The court is bound by the established course of dealings between petitioners and bankrupts in determining the title to the checks in question.

In its brief below, respondent made an earnest attempt to bring the facts in the case at bar within the facts of *Burton* v. *United States*, 196 U. S., 283, and in doing so dwelt upon a few of the superficial features, which at first blush appear to bear semblance to the facts at bar.

In the *Burton* case, the court said at pages 296, 297:

"* * * The evidence was wholly undisputed that each of them was received by the defendant in the City of Washington, D. C., and by him therein indorsed and deposited with the Riggs National Bank of Washington, D. C., and that they were afterwards duly paid by the Commonwealth Trust Company, at St. Louis, Missouri; that the amount of each was in each instance immediately credited by the Riggs National Bank to the account of the de-

fendant with the bank, *and the cashier testified that defendant had the right immediately after the credit was made, to draw out the whole, or any portion thereof, without waiting for payment of the check at St. Louis.*

"There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, endorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account *and nothing further was said in regard to the matter.* In other words, it was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, upon its delivery to the bank, *under the circumstances stated,* the title to the check passed to the bank, and it became the owner thereof. *It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed.*"

Let us analyze "the circumstances stated" which led this Court to a decision reversing the previous doctrine in federal courts on the point and adopting the so-called New York rule.

The salient facts were the following:

(1) Depositor had a *current checking account* with the bank;

(2) Depositor *received personally checks* drawn to his order;

(3) Depositor *personally endorsed* such checks *in blank;*

(4) Depositor *personally delivered* his checks so endorsed to the bank;

(5) Depositor *received immediate credit* for the amounts of said checks from the bank;

(6) Depositor *had right to withdraw* from the bank the face value of said checks at once;

(7) There was *no special agreement* between the depositor and the bank as to the title to the deposits;

(8) *Nothing was said or done* at the time said deposit was made.

Compare the above facts with the facts at bar.

1. Petitioners *did not receive personally* checks herein, *nor were said checks drawn to their order.* The checks were drawn to the order of the bankrupts who were told by the depositing New York banks that the proceeds of said checks were to be paid to petitioners.

2. Petitioners *did not personally endorse* the checks herein in blank or otherwise.

3. Petitioners *did not personally deliver* the checks herein to the bankrupts. The checks at bar were deposited with bankrupts by New York banks upon order of European banks (R., 28, 31) other than that of petitioners.

4. *There was no physical possibility for petitioners to draw at once on the bankrupts* as against the

face value of the checks herein, because petitioners were in Budapest and had to be first advised that either a payment was made for their account to the bankrupts or that the bankrupts received any moneys for their account.

5. Petitioners *never drew on the bankrupts* against any deposits made by them prior to the collection thereof.

6. Petitioners *had no agreement with the bankrupts to treat evidences of debt* deposited with the bankrupts for collection or otherwise *as a deposit of cash.*

7. Petitioners *had no agreement with the bankrupts that an immediate credit should be given* by the bankrupts to them upon the receipt of any evidences of debt from them.

8. Petitioners *did not treat any of their deposits* with the bankrupts *as a deposit of cash.*

9. Petitioners *never treated any of their deposits as an immediate credit* open to them with the bankrupts.

10. *Certain instructions restricting negotiability of the checks herein were conveyed to the bankrupts at the time of the delivery of said checks.*

Can respondent insist that in the case at bar:

> "*There was nothing whatever in the evidence* showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated."
>
> *Burton* v. *United States* (*supra*), p. 297.

Do the "stated circumstances" prove that:

> "In other words, *it was the ordinary case* of the transfer *or sale of the check* by the defendant *and the purchase of it* by the bank * * *."
>
> *Burton* v. *United States* (*supra*), p. 297.

Does respondent mean to insist that the New York banks intended their delivery of their checks to the bankrupts to be the transfer of title *or sale* of said checks to the bankrupts, when they clearly indicated that said checks were payments to the depositor of the bankrupts, and not to the bankrupts themselves? Do the facts at bar allow respondent to allege of the bankrupts' banking house that:

> "It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn."
>
> *Burton* v. *United States* (*supra*), p. 297.

Finally, can this court decide on the record at bar, as it was decided in the *Burton* case, that:

> "From the time of the delivery of the check by the defendant to the bank, it became the owner of the check, it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and *no rights of defendant would have been infringed.*"

The New York banks were apparently attempting to discharge some obligations of foreign banks, such as Julius Baer & Co., and Poster Ungarische Commercial Bank, to petitioners (R., 28, 31). If any presumption is to be indulged in, it is that

when checks are delivered to the payee thereof or his agents, such checks were intended to discharge some debt or obligation to such payee of the drawer thereof, or the party by whose order the checks were drawn.

Nay v. *Curley,* 113 N. Y., 575, 577;
Marks v. *Kellogg,* 170 A. D., 464, 468, aff'd 220 N. Y., 615.

Let us reverse the situation. Suppose the checks in question were not paid by the New York drawers thereof. Would the obligations of foreign banks to petitioners be discharged by mere delivery of said checks to the bankrupt bankers herein? Of course not. Would the bankrupt bankers be liable for the amount thereof to petitioners in case of the dishonor of said checks? Certainly not. Could the bankrupt bankers have torn the checks up or thrown them in the fire with "no rights of petitioners infringed"? Clearly not.

We have been unable to find a single case where the doctrine of *Burton* v. *United States,* was applied to checks delivered by a depositor to the bank (in which he had a general checking account) *for collection and not for general deposit.* Indeed, in view of the state of the law with reference to checks deposited for collection, as set forth under Point Two of this brief (pp. 21-23; 29-32), the extension of the doctrine of *Burton* v. *United States* to the checks deposited for collection would be inconceivable.

That our view of the doctrine of *Burton* v. *United States* is correct is shown by the interpretation of this case by the Court of Appeals of the District of Columbia in *Dirnfeld* v. *Fourteenth Street Savings Bank,* 37 App. D. C., 11, where the court said at page 15:

> *"In the case at bar, we are not embarrassed by any restrictive endorsement of the check or by any special form of receipt. The endorsement was in blank,* and the deposit was entered in the bank book as cash. *Under such conditions* the rule in Maryland is that the bank becomes the owner of the paper by such endorsement." (Citing authorities). "The Court of Appeals was divided, and the rule was established by a majority. It may be, as contended by the appellee, that the decisions establishing the opposing view are in majority. *It would serve no useful purpose, however, to review the cases cited on each side of this vexed question, because we understand the question has been set at rest in this jurisdiction by a recent decision of the Supreme Court of the United States. Burton* v. *United States,* 196 U. S., 283-302; 49 Atl., 482-488; 25 Sup. Ct. Rep., 243."

The Circuit Court of Appeals for the Eighth Circuit in *First National Bank* v. *Federal Reserve Bank,* 6 Fed. (2nd), 339, 341, dealing with a case where the depositor delivered to the bank in which it had an account, checks endorsed generally, but in a separate paper instructed the bank to collect the same and place the proceeds thereof to its account with it, said:

> "Although the checks were endorsed in blank, they were endorsed and deposited to be transmitted for collection, and the credit given therefor in the account of the Lumber Company with the plaintiff bank was subject to the right to charge the checks back to such account if payment therefor in cash was not received. *Such being the facts,* the endorsement

did not transfer the title of the checks to the plaintiff" (*First National Bank of Eads* v. *Fleming State Bank*, 74 Colo., 309; 221, p. 891; *Burton* v. *U. S.*, 196 U. S., 283, 305; Notes 7 L. R. A. (N. S.), 694; 3 R. C. L., Par. 152, p. 524; 7 C. J., Par. 245, p. 597; id., Par. 246, p. 600).

Burton v. *United States* merely affirmed for the federal courts the New York rule prior thereto accepted in a majority of American jurisdictions, because preceding it, many federal cases held that in the absence of any agreement between the depositor and the bank, or any facts to the contrary, every deposit of checks by depositor was deemed to be "for collection," and, if prior to the collection the bank went into bankruptcy, the title remained with the depositor.

City of Philadelphia v. *Eckels*, 98 Fed., 485;
Richardson v. *Denegre*, 93 Fed., 572;
Beal v. *City of Somerville*, 50 Fed., 647 (approved by the Circuit Court of Appeals, 94 Fed., 442, 448).

While none of the federal cases on the point in question were cited in the *Burton* case, or expressly overruled therein, this court adopted there a different rule, generally known, as the New York rule. What is the New York rule on this point?

"In determining whether a bank, by the acceptance of a deposit of a check or draft, has become an absolute purchaser, or only an agent for collection, *reference is to be had to the intention of the parties, as evidenced by the fact and circumstances surrounding the*

deposit. The intention is a question of fact. *St. Louis Ry. Co.* v. *Johnston,* 133 U. S., 566, 576; *In Re Jarmulowsky,* 243 Fed., 632, 633."

First National Bank v. *Stengel,* 169 N. Y. Supp., 217, 220, affirmed in 185 App. Div., 906 and 227 N. Y., 659.

"Title passes only by contract to that effect, to be either expressly proved *or inferred from unequivocal course of dealing*" (*Scott* v. *Ocean Bank,* 23 N. Y., 289).

National Park Bank v. *Seaboard Bank,* 114 N. Y., 28, 34.

In the *Burton* case, this court cited with approval the following statement from *Metropolitan National Bank* v. *Loyd,* 90 N. Y., 530:

"If, as the appellant insist, the check had been deposited for a specific purpose—for collection—the property would have remained in the depositor; but there is no evidence upon which such fact could be established, *nor is it consistent with the dealings between the parties or with any of the admitted circumstances.*"

This court in the *Burton* case specifically limited the rule laid down therein to the "circumstances stated" which, as we have seen, included the most important fact that Senator Burton had the right to draw and in fact always drew against his deposits of checks before their collection by the Riggs National Bank. This court tersely pointed out in its opinion at p. 297, that:

"*There was nothing whatever in the evidence* showing any agreement or understand-

ing as to the effect of the transaction between the parties — the defendant and the bank — making it other than such as the law would imply from the facts already stated."

In *Sweeney* v. *Easter*, 1 Wall., 166 this court said at page 175:

> "*The second branch of the instruction asked is objectionable*, because it referred to the jury the interpretation of the endorsement on the paper, and also required of them to determine the case on the face of the paper and the custom of bankers alone, *without reference to the special facts proven in regard the course of dealing between defendants and Harris & Sons.*"

In *National Bank* v. *Insurance Company*, 104 U. S., 54, this court, speaking of another banking custom (that of the right to set off against depositor's account any debt that may be due to the bank), said at p. 71:

> "It attaches to such securities and funds, not only against the depositor but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied *or by conduct inconsistent with its assertion.*"

In *Re State Bank*, 56 Minn., 119, the court said, at page 123:

> "There is no question but that the general rule is that, upon a deposit being made by a customer in a bank, in the ordinary course of business, of money drafts or other negotiable

> papers, received and credited as money, the title vests in the bank, and the money drafts or other paper immediately becomes the property of the bank; and the bank becomes debtor of the depositor for the amount. And, *if no other facts appeared except these,* they would be held to conclusively show an intention of the parties that the paper should immediately become the property of the bank. *But, after all, the question is one of the agreement of the parties, either express or implied, from the general course of business between them.*"

We submit that careful examination of the opinion of this court in the *Burton* case, *supra,* will show that this court did not decide, as contended by respondent herein, that the intention of the parties to a banking deposit as to the nature of it shall be disregarded, and that in ascertaining said intention no consideration should be given to the course of dealing between the parties as evidenced by their transactions, but the relationship should be exclusively governed by an agreement, if any, between the parties as to the effect of the deposit.

POINT SIX.

Admitted facts herein, showing that petitioners never treated any of their deposits as cash, nor as an immediate credit, nor ever drew against their deposits before collection thereof by bankrupts, nor was it possible for them to so draw, nor were they indebted to the bankrupts at any time, conclusively establish, in the absence of any express agreement to the contrary, that petitioners had no right to draw against their deposits prior to the collection thereof by bankrupts, and that the relationship between them and bankrupts was that of principal and agent and not of creditor and debtor.

In *Burton* v. *United States*, 196 U. S., 283, this court merely affirmed the doctrine, that in the absence of facts establishing a course of dealing between the parties and in the presence of the fact that a depositor had a right to draw at once against his deposits of negotiable instruments to his current checking account with the bank, the title to negotiable instruments passed to the bank immediately upon making of such deposits. To establish such transfer of the title from a depositor to his bank, it is essential that there should be no course of dealing to the contrary, and that it should affirmatively appear that the depositor had a right to draw at once against his deposits without waiting for the collection thereof by the bank. As this court said in the *Burton* case, citing from *Metropolitan National Bank* v. *Loyd*, 90 N. Y., 530, 535:

> "The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, *and the right of Murray to command payment at once was of the very nature and essence of the transaction.*"

In *Re Jarmulowsky,* 243 Fed., 632, the court after citing the general statement in the *Burton* case, so much relied on by respondent herein, said at page 633:

> "*The bank's right, however, depends upon the depositor's immediate and unconditional right and not merely as a favor to draw upon the deposit,* and if it appears that depositor did not have such a right till collection, the bank does not become the owner. (Citing authorities.)"

In ascertaining the relationship between the depositor and his bank, where he has a current checking account, *it is the intention* of the parties to treat the relationship as that of principal and agent or as that of debtor and creditor, which is all important. This principle pervades both the Federal and New York decisions discussing the cases dealing with deposits of negotiable instruments to the depositors' current checking accounts with their banks.

In *First National Bank* v. *Stengel,* 169 N. Y. Supp., 217, affirmed in 185 App. Div., 906 and 227 N. Y., 659, the court said at page 220:

> "In determining whether a bank, by the acceptance of a deposit of a check or draft, has become an absolute purchaser, or only an agent for collection, *reference is to be had to the in-*

> *tention of the parties,* as evidenced by the fact and circumstances surrounding the deposit."

In *Fifth National Bank* v. *Armstrong,* 40 Fed., 46, the court said on p. 49:

> *"The true criterion * * * is whether the depositor intended to part with title, and whether the receiving bank intended* to purchase the paper, and assume the risk of payment, and give an absolute credit therefor, as in cases of discount."

It is submitted that the admitted facts, showing the relationship between petitioners and bankrupts herein, conclusively establish:

(1) That petitioners had *no* right to draw against the deposits of negotiable instruments with the bankrupts prior to the collection thereof;

(2) That the course of dealing between petitioners and bankrupts was such as to indicate that *the relationship was that of principal and agent* and not of creditor and debtor.

The mere fact that no definite or express agreement as to the title to the deposits made by petitioners to their current checking account with bankrupts is proved by either party to this appeal, does not thereby entitle either party hereto to conclude that petitioners had a right to draw against their deposits of negotiable instruments immediately upon making the same. On the contrary the inference seems to be the other way.

In *Perth Amboy Gas Light Co.* v. *Middlesex County Bank,* 60 N. J. Eq., 84, 90, Pitney, V. C. (subsequently a member of this court) in a lengthy opinion discussing various legal consequences of

check deposits by a customer of the bank to his current check account with the same, said at p. 91:

> *"If a depositor deposits a check or draft on a third party with the understanding,* either expressed or implied, *that he is to draw against it at once as if it were cash,* and the bank agrees to accept it and treat it as cash and *the depositor draws against it before the amount is realized by the bank,* then it is properly treated as a deposit of cash. *Or if the depositor is already indebted to the bank,* and the deposit is received in whole or partial payment, the same result follows. *But in the absence of an understanding or situation of this kind it is a mere bailment."*

The record at bar shows that petitioners at the time the checks herein involved were deposited by them with the bankrupts, were not indebted to them (R., 9), nor did they ever or in this particular instance draw against their deposit with the bankrupts prior to the collection thereof by the same.

If, as Pitney, J., said *"in the absence of an understanding * * *, it is a mere bailment,"* then the checks herein must be deemed to have been delivered by the petitioners to the bankrupts for collection merely, and the title in the same remained in the petitioners prior to the actual collection thereof by the bankrupts.

The reason underlying the doctrine of the *Burton* case and the cases preceding and following it, has been repeatedly stated by the courts. All those cases are based upon the fact that where the customer has a right to draw at once against his deposit, his *deposits of negotiable instruments are deemed to be equivalent to deposits of money.* In

other words, in such case negotiable instruments delivered by the bank's customer to his account, against which he is allowed by the bank to draw at once, are deemed to be, as between the depositor and his bank, *deposits of cash.*

The following quotations were cited and approved by this court in the *Burton* case (pp. 302 and 303):

> "The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, *of money, or of drafts or checks received and credited as money,* the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question (*Commercial Bank of Albany* v. *Hughes,* 17 Wend., 94; *Metropolitan Nat. Bank* v. *Loyd,* 90 N. Y., 530)."
>
> *Cragie* v. *Hadley,* 99 N. Y., 131, 133.

> "It is not disputed that Murray held the check as owner—it was his property to do with as he pleased. He had held other checks. Some of these he placed in the Troy bank for collection; *others he deposited and took credit therefor as cash upon his passbook.* As to the first he could give and revoke his own directions as often as he chose, but as to the others when they were by his direction credited to him, the title passed to the bank, and they were not again subject to his control. This we understand to be the result of the general rule applicable to such transactions. *Scott* v. *Ocean Bank of New York,* 23 N. Y., 289; Story Bailm., Sec. 88; *Keene* v. *Collier,* 1 Metc. (Ky.), 415; *Brahm* v. *Adkins,* 77 Ill., 263;

Chapman v. *White*, 6 N. Y., 412; 57 Am. Dec., 464; *Bank of the Republic* v. *Millard*, 10 Wall., 152; *In re Franklin Bank*, 1 Paige, 254; 19 Am. Dec., 413; *Clark* v. *Merchants' Bank*, 2 N. Y., 380."

Metropolitan Natl. Bank v. *Loyd*, 90 N. Y., 530, 534, 535.

"*So when, without more, a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account*, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

Taft v. *Quinsigamond Natl. Bank*, 172 Mass., 363, 364, 365.

The same doctrine was stated in many other cases:

"*The checks were credited as money*, and were indorsed by the payee without restriction. The defendant did not hold them as a mere agent for collection. It held them as owner (*Cragie* v. *Hadley*, 99 N. Y., 131; *Met. Nat. Bank of N. Y.* v. *Loyd*, 90 N. Y., 530; *Burton* v. *U. S.*, 196 U. S., 283, 302, 304; *Taft* v. *Quinsigamond Nat. Bank*, 172 Mass., 363"

Heinrich v. *First National Bank*, 219 N. Y., 1, 5.

"*If a depositor deposits a check or draft on a third party with the understanding*, either expressed or implied, *that he is to draw against it at once as if it were cash, and the bank agrees to accept it and treat it as cash*, and the depositor draws against it before the amount

is realized by the bank, *then it is properly treated as a deposit of cash.*"

Perth Amboy Gas Light Co. v. *Middlesex County Bank,* 50 N. J. Eq., 84, 91 (per Pitney, J.).

"By the usage of bankers, the teller, with whom such deposits (of checks) are generally made, *has no authority to receive them as and for money,* and this known to the depositor; but the teller has authority to receive checks for collection, and, therefore, the presumption is, that they were received for that purpose until the contrary is shown."

Strong v. *King,* 35 Ill., 9, 20.

The facts at bar do not show that there was no agreement at all between the petitioners and the bankrupts. It is alleged by petitioners and admitted by the respondent:

"That petitioners had no agreement with said Knauth, Nachod & Kuhne *to treat* evidences of debt deposited with Knauth, Nachod & Kuhne for collection, or otherwise, *as a deposit of cash, nor that an immediate credit* should be given by said Knauth, Nachod & Kuhne to petitioners upon such evidences of debt" (R., 6).

The conclusion from that allegation and the admission (R., 21) thereof by the trustee, is two-fold. Either there was an agreement to treat the deposits of petitioners with the bankrupts in some manner other than as "deposits of cash" or as "an immediate credit," but such agreement was not proved by either party hereto and hence does not appear

in the record herein; or that in the absence of such agreement, the course of dealing between the parties as showing their intention, should naturally govern the title to negotiable paper deposited by petitioners to their current checking account with the bankrupts.

It is alleged by the petitioners and admitted (R., 21) by the respondent:

> "*That petitioners did not treat* evidences of debt deposited with said Knauth, Nachod & Kuhne for collection, or otherwise, *as a deposit of cash, nor as an immediate credit* open to petitioners by said Knauth, Nachod & Kuhne upon receipt of any evidences of debt, nor did petitioners draw upon said Knauth, Nachod & Kuhne against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said Knauth, Nachod & Kuhne" (R., 6, 7).

A customer of the bank having a current checking account with it may make his deposits in either of the two following ways, to wit: as cash or for collection. It is admitted here by the respondent that the petitioners did not have an agreement with the bankrupts to treat their deposits as cash, nor did they ever, in fact, treat the same as cash or as an immediate credit. Hence, their deposits were for collection, and, consequently, the very reason upon which the decisions in the *Burton* case and the other cases above cited were based, i. e.; that the deposits there were either treated or agreed upon to be treated as moneys or cash, does not apply to the case at bar.

Again, the "unequivocal course of dealing"

(*National Park Bank* v. *Seaboard Bank*, 114 N. Y., 28, 34), between petitioners and the bankrupts herein indicates that petitioners never drew against their deposit of checks prior to the collection thereof by the bank, that they had no agreement with the bankrupts allowing them to draw against deposit of checks by them prior to their collection, that they had no agreement that they should be credited with the proceeds of their checks as cash, immediately upon the deposit thereof with the bankrupts, nor did they ever treat their deposit of checks as a deposit of cash (R., 6, 7, 22), (all of which facts are admitted by the respondent in the case at bar) (R., 21). These facts completely negative respondent's contention, that petitioners had a right to draw against their deposits prior to their collection by the bankrupts.

The question whether circumstances surrounding the deposit of checks or showing the dealings between the depositor and the bank are controlling on the question of the intention of the parties to pass the title to the checks, was discussed at length by this court in *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566, where Chief Justice Fuller said at pages 573 and 574:

> "It was a sight draft drawn by the San Francisco Company on its debtor in Boston, and collected through the Marine Bank's correspondent at that place. Neither it, nor the money collected upon it, passed into the hands of any third person for value. The collection was made after the Marine Bank had closed its doors. *It is not claimed that there was any express arrangement or understanding between the San Francisco Company and the bank that the deposits of out-of-town paper should be*

treated as cash. Can such an understanding be implied from the mere fact that the San Francisco Company was credited with the draft upon the books of the bank, as if the deposit were of money, although the deposit ticket named it under the head of checks, and that the Company itself added on the stubs of its check-book such deposits to the current amount, coupled with an alleged commercial usage to allow good customers to draw against a credit thus created? In five years of business between them, the San Francisco Company had never drawn against such paper. The evidence of the bank's clerks leaves no doubt that, as to out-of-town drafts for large amounts, the bank kept track of them and reserved the right to charge exchange and also interest for the average time taken in collection, notwithstanding its agreement to pay interest on the daily balances. This was not consistent with the theory of an understanding between the bank and the Company that the title to this and similar drafts should pass absolutely to the bank."

In *Scott* v. *Ocean Bank*, 23 N. Y., 290, 291, the facts were stated by the court to be as follows:

"All that is found in relation to such dealings is that Lyell, who was a banker in Detroit and kept an account with that company at its office in the City of New York, made from time to time, between June, 1857, and the 24th of August in that year, remittances to it and drew drafts upon it; that he was a large depositor with it of money and bills; that there was an arrangement between him and it, that

> he should be allowed interest at the rate of 4% per annum on his average balances * * * that the bill was on day of its receipt accepted by the drawees on presentation, and returned to the company, in whose possession it remained till its transfer to defendant on the 24th day of the same month, and that Lyell had at that time not been credited with said bill by the company * * *."

The court summed up its conclusions at page 292 thus:

> "When, therefore, it appears that the bill in question was retained in the possession of the company, after its acceptance, and that no credit had been given for it at the time it was passed to the defendant, and when nothing is disclosed in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account before its collection, *or that Lyell ever drew or was entitled to draw upon the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be considered that the company at the time of the transfer stood in the relation of agents for its collection merely. There is no ground based on these dealings (and no other is claimed), for the conclusion that the ordinary relation of debtor and creditor between the company and Lyell in relation to the bill in question existed, or that it had become, as between them, the property of the company.*"

In the *Johnston* case, *supra,* this court held that the fact that the San Francisco Company "*had*

never drawn" against their deposits and that the bank "reserved the right to charge exchange and also interest for the average time taken in collection, notwithstanding its agreement to pay interest on the daily balances"—"was *not* consistent with the theory of an understanding between the bank and the company that the title to this and similar drafts should pass absolutely to the bank."

In the *Scott* case, *supra*, the court held that because it was not shown to it "that Lyell ever drew or was entitled to draw upon the company, or that it was bound to accept drafts, otherwise than upon funds actually received in cash" there was no ground "for the conclusion that the ordinary relation of debtor and creditor between the company and Lyell in relation to the bill in question existed, or that it had become as between them, the property of the company."

IN THE CASE AT BAR, RESPONDENT ADMITTED:

> "That petitioners had no agreement with said K. N. & K. to treat evidences of debt deposited with said K. N. & K. for collection or otherwise as a deposit of cash, nor that any immediate credit should be given by said K. N. & K. to petitioners upon the receipt of such evidences of debt" (R., 6).
>
> "That petitioners did not treat evidences of debt deposited with said K. N. & K. for collection and otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K. N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K. N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K. N. & K." (R., 6, 7).

"That your petitioners did not draw upon said K. N. & K. against said account as aforesaid, before the collection said by K. N. & K. of the moneys due upon such evidences of debt as were deposited by the petitioners herein to their account with said K. N. & K." (R., 22).

"That at the time petitioners herein caused said checks hereinbefore described to be delivered to said K. N. & K., petitioners had a credit balance with said K. N. & K. amounting to several thousand dollars and were not then, and have not been at any time since then, and are not now, indebted to said K. N. & K. or to said Receiver" (R., 9).

Thus petitioners, standing squarely on the decision in the *Burton* case, are clearly entitled to reclaim the amount of the checks in question on the ground that upon the undisputed facts showing the course of dealings between them and the bankrupts, it is evident that petitioners had no right to draw against their deposit of checks prior to the collection thereof by the bankrupts and that respondent failed to tender any evidence whatsoever in support of the existence of such right on the part of the petitioners in the case at bar. As this court said in the *Johnston* case, *supra,* at pages 575 and 576:

"If there be no bargain that the property should be changed, the relation resembles that of principal and agent. *Mere liberty to draw does not make out such a bargain* * * *."

"*The question was one of fact rather than of law, and we think there should be something more in the evidence tending to establish that the San Francisco Company understood that*

*the bank had become owner of the paper, than these mere credits for convenience, before that can be held to be the fact * * *.*"

It follows therefore that the checks herein were deposited by the petitioners for collection, and not being collected prior to the filing of the petition in bankruptcy herein, title to said checks, and to the proceeds thereof collected by the receiver, is in the petitioners.

In re Jarmulowsky, 249 Fed., 319, 320, 321, 322;
In re Havens, 8 *Bened.*, 309, 310, 311;
Levi v. *National Bank of Missouri,* 5 Dill., 104, 106, 109;
Manufacturers' National Bank v. *Continental Bank,* 148 Mass., 553, 558, 559;
First National Bank v. *First National Bank,* 76 Ind., 561, 569, 570;
Morse on Banks & Banking (5th Ed.), Section 567.

POINT SEVEN.

Petitioners duly fulfilled the duty of tracing the proceeds of their checks to the specific funds in the hands of the trustee in bankruptcy.

The checks of the petitioners were deposited with the bankrupts on June 15th, 1923 (R., 8). The petition in bankruptcy against Knauth, Nachod & Kuhne was informally filed with the judge of the court at 10:30 P. M. on June 15th, 1923, and formally filed with the Clerk of the court at 9:30 A. M. on June 16th, 1923 (R., 5).

Knauth, Nachod & Kuhne, after closing their business at 3 P. M. on June 15th, 1923, never reopened their offices for business thereafter. The proceeds of said checks were collected by the Receiver in bankruptcy during the business hours of the morning of June 16th, 1923, through the American Exchange National Bank (R., 8), and the proceeds thereof went to swell the current checking account of the bankrupts with said American Exchange National Bank. The balance of said account, which had not been operated thereafter by the bankrupts, was finally fixed by the American Exchange National Bank at $212,127.86 (R., 53).

At the time of filing the petition in bankruptcy herein, the bankrupts were indebted to the American Exchange National Bank in the sum of $250,000 (R., 52, 53), secured by deposit of bonds and stocks which, taken at their then market value, exceeded the amount of said loan (R., 10).

Thereafter and pursuant to the instructions of the Receiver, the American Exchange National Bank sold some of the said securities deposited as collateral for said loan with it, and applied the proceeds of said sales to the liquidation of said loan (R., 52, 54, 55, 56). Then, on July 12th, 1923, the American Exchange National Bank, *pursuant to the instructions of the Receiver,* applied the balance of said current checking account between it and the bankrupts, i. e., $212,066.16, to the payment of the balance of said loan then amounting to $229,503 and $1,140.99 interest thereon. On the same day the Receiver delivered to the American Exchange National Bank his check for $18,851,83 in liquidation of the balance of said loan and the American Exchange National Bank delivered to the Receiver the balance of the stocks and bonds held by it as a collateral for said loan (R., 57, 58, 59).

It is clear from the above facts that, since the bankrupts did not operate their current checking account subsequent to the deposit and collection of the petitioners' checks therein, the proceeds thereof were part of the final amount thereof, i. e., said sum of $212,066.16. It is also evident that the Receiver, and not the bank, having applied the proceeds of petitioners' checks to the liquidation of the bankrupts' loan, instead of using general funds of the bankrupt estate in his hands for said purpose, thereby swelled the general funds by the amount of the proceeds of said checks, to wit, $16,294. However, it is immaterial whether said transaction was made by order of the Receiver or otherwise, because it was the duty of the bank having collateral to first apply the collateral to the liquidation of the loan and then to resort to the balance of the current checking account of the bankrupts with it.

Smith v. *Savin,* 141 N. Y., 315;
Baker v. *Davie,* 211 Mass., 429, 441;
Pomeroy, Equity Jurisprudence, Sec. 396.

The law is well settled that if the lowest balance of the current checking account of the bankrupt bank exceeds the amount of checks deposited with it for collection with another bank, that balance is supposed to contain the proceeds of such checks, and the depositors of said checks are deemed to be preferred creditors as to the sums due to them against said balance of said current checking account.

In re Brown, 193 Fed., 24, affirmed as *Schuyler* v. *Littlefield,* 232 U. S., 707;
Central Natl. Bank v. *Conn. Mutual Life Ins. Co.,* 104 U. S., 54, 66, 69;
Allen v. *United States,* 285 Fed., 678, 681;

In re Jarmulowsky, 258 Fed., 231;
In re Bolognesi, 254 Fed., 770, 773;
Titlow v. *McCormick*, 236 Fed., 209, 215;
Southern Cotton Oil Co. v. *Elliott*, 218 Fed., 571;
In re See, 209 Fed., 174;
Empire State Surety Co. v. *Carroll County*, 194 Fed., 605;
City of Philadelphia v. *Aldrich*, 98 Fed., 487, 488.

The same rule applies if a specific fund traced is not a balance of a current checking account but securities.

In re Gay & Sturgis, 251 Fed., 420.

And the doctrine is not effected by the fact that withdrawals are made by the bankrupt bank from its current checking account, because the first funds withdrawn from said account are deemed in law to be the bank's own funds and not proceeds of checks deposited with it for collection, as the latter constitute trust funds.

Brennan v. *Tillingast*, 201 Fed., 609;
Empire State Surety Co. v. *Carroll County*, 194 Fed., 593, 605;
Board of Commissioners v. *Strawn*, 157 Fed., 49, 51;
City of Philadelphia v. *Aldrich*, 98 Fed., 487, 488.

The petitioners are also entitled to recover from the trustee herein the proceeds of their checks deposited with the bankrupts for collection, on the ground that the Receiver's action in using their funds to pay the loan of the bankrupts to the Amer-

ican Exchange National Bank swelled the general fund in the hands of the trustee, held by it for the benefit of the creditors.

Gorman v. *Littlefield,* 229 U. S., 19;
Lowell v. *Brown,* 284 Fed., 936, 944;
In re Dunn & Co., 193 Fed., 212, 216;
In re Atcheson Co., 170 Fed., 427, 429;
In re Ryea's Estate, 143 Fed., 182, 183, 184;
Beard v. *Independent District,* 88 Fed., 375, 379;
Laport v. *Carpenter,* 91 Hun (N. Y.), 76, 81.

Finally, when the Receiver used the proceeds of the checks of petitioners to pay the loan of bankrupts, he thereby subrogated petitioners to the rights of the American Exchange National Bank to sell the shares and bonds held by it as a collateral for the satisfaction of its loan to the bankrupts, and made said shares and bonds a specific fund in the hands of the trustee herein, which must be liquidated to pay in full the sums due to petitioners as the proceeds of their said checks.

In re Gay & Sturgis, 251 Fed., 420, 422;
In re Leavitt & Grant, 215 Fed., 901;
In re Keating, 71 Fed., 29, 37;
Cole v. *Malcolm,* 66 N. Y., 363, 366;
Pease v. *Egan,* 121 N. Y., 262, 272;
Young v. *Pecos County,* 46 Tex. Civ. App., 319, 323, 326.

Conclusion.

The law involved in this case is of utmost importance to depositors and banks throughout the country and the decision of this court on the points

involved will clarify one of the most mooted and uncertain branches of banking law.

The reversal of the decision of the Circuit Court of Appeals in regard to the check for $1,294 would mean that the banks would be deemed to be purchasers of all the checks deposited with them by the customers to the current checking accounts with them, when said checks are endorsed generally, and a bookkeeping credit given therefor prior to their collection, regardless of the circumstances surrounding the delivery thereof. It would mean that depositors of generally endorsed checks would lose their right to retain title to the proceeds thereof as against the banks wherein they have a current checking account by any means. It would mean that the course of dealings between the depositor and the banks should be disregarded in ascertaining title to the checks deposited by the latter to their current checking accounts with said banks. It would mean a further impairment of the rights of the depositors in their dealings with their banks, and the relaxation of the responsibility of the banks to their depositors conferring on the latter benefits of a highly controversial nature.

The affirmance of the decision of the Circuit Court of Appeals in regard to the check for $15,000 would mean that the bank could disregard the instructions of its customers unless there were written on the negotiable instrument itself, by a simple device of delivering the same to another bank for collection, instead of collecting the same itself. It would mean that depositors of generally endorsed checks would lose their right to retain title to the proceeds thereof as against the banks wherein they have a current checking account by any means other than some writing on the checks themselves. It would mean that a premium will be

placed upon dishonesty of the bank in withholding said instructions from its correspondent bank. It would finally mean the abolition of the safe and sound rule of law that technical expressions having settled legal meaning should be deemed to have been used in that sense, in the absence of any evidence to the contrary.

We ask the affirmance of the decision as to the check for $1,294 and the reversal of the decision as to the check for $15,000 for the sake of uniformity and constancy of our commercial and banking law.

The decision of the Circuit Court of Appeals as to the check for $1,294, should be affirmed and as to the check for $15,000 should be reversed with costs.

Respectfully submitted,

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Counsel for Petitioners in No. 337
and Respondents in No. 338.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 48.

ALEXANDER LATZKO, ET AL.,

Petitioners,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc.,

Respondent.

No. 49.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc.,

Petitioner,

against

ALEXANDER LATZKO, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR ALEXANDER LATZKO, et al.

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Supreme Court of the United States

OCTOBER TERM, 1927,

Nos. 48 and 49.

In the Matter
of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL PROPER and EMIL HOCHSTEIN, as copartners, doing business under the firm name and style of N. LATZKO and A. POPPER,
Petitioners-Respondents,

THE EQUITABLE TRUST COMPANY OF NEW YORK, as trustee in bankruptcy, etc.,
Respondent-Petitioner.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF FOR ALEXANDER LATZKO, et al.*

Major Issues of Law Involved in Latzko and Rochling Appeals.

Appeals No. 34 (Rochling) and Nos. 48 and 49 (Latzko) present two major questions of law for the decision of this court:

*Italics throughout this brief are ours, unless otherwise indicated.

1. Whether this court will now reject the doctrine of *White* v. *Miners National Bank*, 102 U. S., 658, and the cases both in this and other courts following it for nearly fifty years, wherein it was laid down that the use of the words "for account of" in connection with negotiable instruments restricts their negotiability and retains the title to the check in the person for whose account it is deposited. If this court will follow its own decision in the *White* case, *supra*, it will not be called upon to consider the second major proposition.

2. Whether the principles laid down by this court in *Burton* v. *United States*, 196 U. S., 283, for the ascertainment of title to a check as between the depositor and his bank, limit the inquiry to the existence or non-existence of any express or implied agreement between the depositor and his bank, or, on the contrary, include in the inquiry the circumstances surrounding the deposit and the course of dealing between the parties as a basis from which the existence and non-existence of said agreement should be deduced.

The Briefs of the Respondent.

The briefs of the respondent in the *Rochling* and in the present case present an interesting contrast. In the *Rochling* case, the respondent found itself face to face with a situation, where the checks involved on the face thereof bore the words of restriction, but where the course of dealings between depositor and his bank and the circumstances surrounding the deposit of said checks were favorable to respondent's contention that the title to said checks passed to the bank. Accordingly, the respondent there adopted the standpoint and strenuously argued that the relationship between the depositor and his bank was a matter of intention of the parties as evidenced by facts showing the course of dealing between them and circumstances

surrounding the deposit, and if those facts tended to prove a relationship different than that implied by the form of the check, the facts governed and not the form.

In the *Latzko* case, where the admitted course of dealing between the parties and the circumstances surrounding the deposit are unfavorable to respondent's standpoint, it adopted the argument that the title to the check as between depositor and his bank is to be determined by the presence or absence of an agreement between them, conferring or withholding a right upon depositor to draw at once against his deposits of negotiable instruments: to wit, without waiting until they are actually collected by his bank. The respondent insists that the very same cases on which it bases its argument in the *Rochling* case establish for the *Latzko* case a different doctrine rejecting entirely the examination of facts showing the course of dealing between the depositor and his bank and the circumstances surrounding his deposit. This shifting stand of the respondent is significant particularly as it freely admits that the *Latzko* appeals "essentially present the same questions as are presented" in the *Rochling* case (Respondent's Latzko Brief, p. 2). While the predicament of the respondent is appreciated, yet it should not lead this court to two different results but should rather facilitate it in recognizing as the true test of the title to negotiable instruments deposited by a depositor with his bank, the circumstances surrounding the deposit and the course of dealing between the parties, which may or may not be evidenced *inter alia* by an express or implied agreement between the depositor and his bank.

Respondent's Brief in the Latzko Case.

The statement of facts of the respondent in the Latzko appeals is somewhat novel, inasmuch as it rejects the accepted method of stating the facts impartially, reserving the contended discussion thereof to the argument. The respondent's argument begins with the facts them-

selves. Hence, the necessity arises of answering some of these arguments at this stage of this brief, and of reserving the rest of them for a later part thereof.

1. At page 5 the respondent marks what it terms "Erroneous statement of facts in petitioner's brief". We are unable to discern said error. The words "for collection" are used in connection with checks in two well established meanings. One is, to imply restriction on their alienation. The second is, to obtain the cash proceeds thereof. We have used that on page 3 of our former brief in the second sense. Hence, its use by us was legitimate.

2. On page 6 respondent attempts to intimate that it was material for us to show that no interest was received by petitioners upon their deposits with the bankrupts. This fact is entirely immaterial to the case of the petitioners, but is vital to the case of the respondent. We merely pointed out that this material element in favor of the respondent present in the *Rochling* case is absent in the *Latzko* case, thus strengthening the position of the petitioners, and correspondingly weakening that of the respondent. It is enough to view pages 8, 20 and 21 of the respondent's brief in the Rochling case in order to appreciate the importance to the respondent's case of the interest bearing fact herein discussed.

3. On pages 6 and 7 of its brief, the respondent makes a further attempt to obliterate another important difference in facts between the *Rochling* and *Latzko* cases. In the *Rochling* case, the depositor desired his account credited with certain sums on a certain date, which was the day of the deposit of negotiable instruments and was in point of time the day before they were collected through the clearing house. This constituted an important fact showing the sale of said checks by depositor to his bank. In the *Latzko* case, the petitioners did not

desire any credits upon any day. The respondent argues that "It is to be presumed that international bankers dealing in transfers of large credits are at all times aware when they *may expect* credits to be placed to their account and to be made available for their use." We do not know anything about any such presumption, but even if it is assumed for the sake of the argument to be true, then the record in the case at bar shows that the petitioners expected credits to their account *only after the bankrupts received through the clearing house the proceeds of the negotiable instruments deposited with them by the petitioners.* It is admitted by the respondent:

> "That your petitioners did not draw upon said K. N. & K. against said account aforesaid *before the collection* by said K. N. & K. of the moneys due upon such evidence of debt as were deposited by the petitioners herein to their account with said K. N. & K." (R., p. 22).
>
> "That petitioners did not treat evidences of debt deposited with said K. N. & K. for collection or otherwise, as a deposit of cash, *nor as an immediate credit* open to petitioners by said K. N. & K. upon receipt of any evidence of debt * * *" (R., pp. 22, 23).

At page 7 respondent queries the utility of pointing out the distinction between the cashier's check and a check drawn in another bank. The distinction was made because of the argument advanced below by the respondent and discussed at length on page 13 of our main brief. If respondent decided to abandon said argument now, the distinction, of course, becomes unnecessary, but forms no ground for reproach to us.

Points of Agreement With Respondent.

Respondent agrees with us:

1. That the petitioners duly fulfilled the duty of tracing the proceeds of their checks to the specific funds in the hands of the trustee in bankruptcy.

2. That the Circuit Court of Appeals erred in holding that the memorandum accompanying the check for $15,000 and stating that the same was delivered to the bankrupts "for account of" petitioners, did not constitute a part of the contract controlling the title of said parties to said check (Respondent's Brief, p. 38).

3. That in the eye of law there was no distinction in the facts herein in so far as they deal with either Goldman-Sachs' check for $15,000 or the National City Bank's check for $1,294.00 (Respondent's Brief, p. 38).

4. That in the eye of law it is immaterial whether either or both of said checks were cashier's checks or depositor's checks drawn in another bank (Respondent's Brief, p. 7).

5. That in the eye of the law it is immaterial whether Goldman-Sachs & Company and the National City Bank in depositing the checks herein with the bankrupts for the benefit of the petitioners were acting as principals or as agents for the petitioners.

6. That the relationship between the depositor and his bank depends on the intention of the parties, to be ascertained as a matter of fact (Respondent's Brief, pp. 8, 17).

7. That *in the absence of any facts* showing the nature of the relationship between the depositor and his bank, or the circumstances surrounding the deposit, or the course of dealing between the parties, a deposit of negotiable in-

struments generally endorsed by a depositor to his current checking account in a bank would result in the relationship of debtor and creditor (Respondent's Brief, pp. 16, 17).

Points of Disagreement With Respondent.

We consider the respondent to be in error on the following propositions of law:

1. That there is a general presumption that a relationship of debtor and creditor exists between any depositor having a current checking account in a bank and the bank wherein said account is had.

No such general presumption exists. Such principle is applied *only* in those cases where negotiable instruments, generally endorsed, are deposited by depositor to his current checking account and *no facts are submitted* showing either the terms of depositor's agreement with his bank in regard to said account or the circumstances surrounding said deposit or the course of dealing between the depositor and the bank.

Furthermore, once the respondent conceded that the relationship between a depositor and his bank is a matter of intention it thereby negatives all of its argument because there could be no presumption of law as to the intention of the parties; that being in every case a matter of fact.

2. That in order to rebut said presumption the depositor must show that he has no right to draw against his deposits of negotiable instruments to his current checking account prior to their collection by his bank by virtue of some express or implied agreement with his bank.

Whether a depositor has or has not a right to draw is a legal conclusion to be deduced from the facts showing the nature of the relationship between depositor and his bank or from the circumstances surrounding the deposit, or

from the course of dealing between the parties. The presence or the absence of an express or implied agreement between the depositor and his bank is merely *one* of many other facts or circumstances which help to establish or refute the conclusion that the depositor did or did not have said right to draw.

3. That the restrictive meaning of the expressions "account of" and "favor of" is limited to the instances where the same are used in the endorsements written upon the backs of negotiable instruments.

We have shown in our main brief that an endorsement does not cease to be such because it happens to be written on the front of negotiable instruments or in a memorandum accompanying the same, and cited many authorities in support thereof (pp. 18 and 19). We also submit that it is immaterial whether said expressions are used between the endorsers or between depositor and his bank. Could not a depositor tell his bank, *even orally,* that he deposits certain checks "for collection" and thereby retain the title to the proceeds thereof? Would it make any difference in law, if said direction was written by the depositor on the back of said checks or in accompanying memorandum, or if it were oral? While all these distinctions would be important in the case of third parties, they have no bearing whatsoever upon relationship between depositor and his bank, which is the relationship this court is called upon to consider in the case at bar.

4. That the unambiguous and settled, legal, restrictive meaning of expressions "account of" and "favor of" can be varied by facts showing surrounding circumstances to the extent of proving that they were used in the case at bar in a non-restrictive sense.

We do not know of any authority that supports this proposition and cases cited by the respondent do not support its contention.

5. That the alleged facts, to wit: that deposit herein was made by the petitioners themselves and to their current checking account with the bankrupts, entitle the court to reject the settled restrictive meaning of the expressions of "account of" and "favor of".

In our humble opinion this argument of the respondent is a complete *non sequitur*. Moreover, the facts at bar conclusively establish that the deposit of the checks herein was made not by the petitioners but by the New York banks upon instructions from their correspondent banks abroad, and that there is no evidence whatsoever that the New York banks in making said deposit knew that the petitioners had a current checking account with the bankrupts.

POINT ONE.

Respondent admits that the Circuit Court of Appeals erred in its holding as to the Goldman-Sachs & Company's check for $15,000.

On page 38 of its brief respondent concedes the Circuit Court of Appeals "misapprehended the problem" and that there is no distinction between the restrictive statement whether it appears on the face of the check or is contained in a memorandum accompanying the same. Respondent states there that:

> *"If the phrase was notice to the bankrupts of anything, it was just as much notice to the bankrupts whether it appeared on the face of the check or in a covering letter to them."*

Assuming, then, that the Circuit Court of Appeals was right in holding that the title to the National City Bank's check for $1,294 was in the petitioners at the time of the

bankruptcy of Knauth, Nachod & Kuhne, the decision of said court in so far as the check of Goldman-Sachs & Company for $15,000 is concerned must be reversed as erroneous upon admission of the respondent herein, that there is no distinction in facts or in law between the two checks involved in these appeals.

POINT TWO.

The respondent misunderstands the decision of this court in BURTON v. UNITED STATES.

The BURTON case lays down no general presumptions, but holds that certain facts would show the intention of the bank and its depositor to establish the debtor-creditor relationship.

The uncontradicted facts at bar show that the intention of the bankrupts and the petitioners was not to establish the debtor-creditor relationship between them.

The Circuit Court of Appeals as a result of an error which we will explain at a later part of this brief concluded that the petitioners pleaded that they caused the National City Bank and Goldman-Sachs & Company, *as their agents,* to deliver checks herein involved to the bankrupts. No such plea was made by the petitioners, nor was such fact ever conceded by them in the course of this litigation, or otherwise. At this stage of the argument, however, we do not consider it important to discuss the meaning of the verb "caused" as used by the petitioners in their petition. "Caused" is a synonym of "occasioned" and, standing alone, does not show the capacity in which petitioners caused the delivery of said checks to the bankrupts. On the other hand, the facts in the record herein

completely refute the contention of the respondent that *the checks herein were delivered by the New York banks as agents for the petitioners.*

A.

Basic error of respondent.

The fundamental error of respondent's argument as advanced under its Point I is that it assumes that in *Burton* v. *United States,* 196 U. S., 283, this court laid down a principle that a general presumption exists in favor of debtor-creditor relationship between the bank and its depositor, and that there is a duty on the depositor to refute this *prima facie* presumption, if he claims that any other relationship between him and his bank.

We have carefully examined the decision of this court in said case and in other cases and find no ground whatsoever for this contention. The rule as to the relationship of a bank and its depositor is that it is a matter of intention to be deduced from the facts in each particular case.

In the *Burton case,* supra, this court said:

> *"There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction* between the parties—the defendant and the bank—making it other than such as the law would imply *from the facts already stated."*

This statement, recently approved by this court in *Douglas* v. *Federal Reserve Bank,* 271 U. S., 489, shows that the doctrine of the *Burton case* is as follows:

1. That where a depositor has a right to draw immediately against the deposit of checks to his current checking account with the bank, and he deposits checks therein generally endorsed, these facts show the intention to establish the relationship of debtor and creditor between his bank and him.

2. That notwithstanding such state of facts different intention may be established by the evidence.

3. Such evidence may consist in an agreement, express or implied.

4. Such evidence may consist of an understanding proved either by the established course of dealing or the circumstances surrounding the deposit.

In the recent case *In re Jarmulowsky,* 249 Fed., 319, the Circuit Court of Appeals for the Second Circuit unanimously said, at page 321:

> "Whether there was any other or special agreement made *is a question of fact.*"

Chief Justice Fuller in *St. Louis & San Francisco Ry. Co.* v. *Johnston,* 133 U. S., 566, discussing title to a check; said at page 576:

> *"The question was one of fact rather than of law.* * * *"

In a recent work dealing with this question (Brady on Law of Bank Checks, 1926), it is stated at page 467:

> "As stated above the question whether title to a check passes upon its deposit in a bank depends to a large extent upon the unexpressed intention of the parties *as evidenced by the attending circumstances.*"

In the *Burton case,* this court quoted with approval the following statement from *Metropolitan National Bank* v. *Loyd,* 90 N. Y., 530:

> "If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, *but*

> *there is no evidence upon which such facts could be established, nor is it consistent with the dealings between the parties, or any of the admitted circumstances."*

For further authorities we refer the court to Point Five in our main brief, and particularly to pages 53, 54, 55 and 56 thereof.

The true test is not as contended by the respondent (its Brief, p. 16).

> "Is there any evidence to show that as between banker and depositor a relationship different than that of debtor and creditor was intended to be created",

but

Is there any evidence from which the court may discern the intention of the parties as to the title to the deposit of checks.

If there is no evidence, the law will imply the relationship of debtor and creditor. If there is evidence, that evidence *must be considered,* whether it consists of an express or implied agreement, a course of dealing or other circumstances surrounding the deposit.

Apparently, the respondent itself practically conceded this standpoint of the petitioners. It said at the end of page 17 of its brief:

> *"In the absence of evidence to the contrary,* that intention is presumed by the Burton case to contemplate a debtor-creditor relationship."

Again at page 8 of its brief respondent says, in respect to the appeals in these cases and in the Rochling case:

> "The only question present in all of these cases is what was the relationship *as a fact* between the bankrupts and their depositors."

At page 16 of its brief respondent admits that

> "Of course, varying circumstances have been held sufficient to indicate that the relationship between bank and depositor *was not intended* to be that of debtor and creditor upon the deposit of checks, and that the *relationship was intended* to be that of bailor and bailee or principal and agent."

If the relationship between a depositor and his bank depends upon the intention of the parties and that, in turn, as conceded by the respondent, is a matter of fact, it is clear that no legal presumption may exist as to such relationship, because the law may not indulge in any presumption as to such matter of fact as the intention of the parties in any particular instance. That intention, of necessity, must be deduced by the court in every particular case from the facts submitted to it by the litigants.

If the facts submitted by them show nothing else but a maintenance of a current checking account by depositor with a bank and a deposit of negotiable instruments generally endorsed by the depositor to his account then the legal relationship established by such facts is that of debtor and creditor. This result is arrived at in such cases not because of the existence of any presumption but because said legal conclusion logically follows from the state of facts proved to the court.

B.

Respondent intentionally disregarded uncontradicted facts showing that the relationship of principal and agent existed between bankrupts and petitioners.

Confronted with admitted facts constituting crashing evidence that the relationship herein between the petitioners and bankrupts was that of principal and agent, respondent adopted a simple method of evading the issues

herein. It first of all, invented a non-existing theory of a general presumption in favor of debtor and creditor relationship, and, then, secondly, entirely omitted to discuss the uncontroverted facts showing the intention of the bankrupts and the petitioners to establish between them a relationship other than that of debtor and creditor. The material facts admitted at bar are these:

1. That both checks were delivered to the bankrupts either bearing on the face thereof or accompanied by restrictive instructions.

2. There was "no agreement with said K. N. & K. to treat evidences of debt deposited with said K. N. & K. for collection or otherwise as a deposit of cash, nor that an immediate credit should be given by said K. N. & K. to petitioners upon the receipt of such evidences of debt" (R., 6).

3. That the course of dealing between the bankrupts and petitioners was as follows:

> "That petitioners did not treat evidences of debt, deposited with said K. N. & K. for collection and otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K. N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K. N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K. N. & K." (R., 6, 7).
>
> "That your petitioners did not draw upon said K. N. & K. against said account as aforesaid, before the collection said by K. N. & K. of the moneys due upon such evidences of debt as were deposited by the petitioners herein to their account with said K. N. & K." (R., 22).

"That at the time petitioners herein caused said checks hereinbefore described to be delivered to said K. N. & K., petitioners had a credit balance with said K. N. & K. amounting to several thousand dollars and were not then, and have not been at any time since then, and are not now, indebted to said K. N. & K. or to said Receiver" (R., 9).

The effect of fact (1), *supra,* is that the checks herein were received by the bankrupts for collection. *White* v. *Miners National Bank,* 102 U. S., 658, and cases preceding and following it (see pp. 18-32 of our main brief).

The effect of fact (2), *supra,* is that there either was an agreement to treat the deposits of the petitioners with the bankrupts in some manner other than as "deposits of cash" or as "an immediate credit", but such agreement was not proved and is not in evidence; or that in the absence of such agreement a course of dealing between the parties showing their intention should naturally govern the title to the checks herein.

The effect of fact (3) is to show that the course of dealing between the parties herein completely excluded the application to the relationship herein of the doctrine of debtor and creditor. We refer the court for detailed discussion of this point to pages 56-70 of our main brief.

C.

Respondent's authorities support the contention of petitioners.

At pages 11-16 respondent traces the development of the doctrine in the Burton case and shows that the law will not imply relationship of debtor and creditor, *unless the intention of the parties is that the deposit of checks should be treated in the same manner as a deposit of cash money.* To this effect it cites *Foley* v. *Hill,* 2 H. L., 28, and *Bank of Republic* v. *Millard,* 10 Wall., 152, in which deposits

of moneys were involved and *Cragie* v. *Hadley*, 99 N. Y., 131, and *Metropolitan* v. *Loyd*, 90 N. Y., 530, concerned with deposits of checks.

In the *Cragie case, supra*, the court said:

> "The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, *of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks*, is immediately vested in and becomes the property of the bank, is not open to question (*Commercial Bank of Albany* v. *Huges*, 17 Wend., 94; *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y., 530)."

Many other cases are cited in our main brief (pp. 60-64), but the point is best illustrated by the two following quotations.

In *Standard Trust Co.* v. *Commercial Natl. Bank*, 240 Fed., 303, where the checks were accepted by the bank as the equivalent of cash, the court said at page 307:

> "When the payees deposited this check, *it was accepted as the equivalent of cash.* They were allowed to draw upon it the same as though they had made a deposit of so much money, and in point of fact they did check it all out the same day. * * * We deem it not doubtful that the effect of the transactions under review was to make the bank the owner of this check, for value, and to clothe it, as such owner, with all the rights of a holder in due course of a negotiable instrument. *Armstrong* v. *Bank*, 133 U. S., 433; *Burton* v. *United States*, 196 U. S., 283."

In *Goshorn* v. *Murray*, 197 Fed., 407, where there was no testimony that checks and vouchers were received as a deposit of money, the court said at page 411:

> "All these are perhaps slight circumstances tending to show that the checks and vouchers were received for collection only and not as a deposit only, but, *taken with the fact that there was no testimony tending in the slightest degree to show that the checks and vouchers were received as a deposit of money, the conclusion cannot be avoided that the deposit was for collection and the Cosmopolitan National Bank was the agent for their collection, and the relation of debtor and creditor did not obtain between the Cosmopolitan National Bank and the complainant.*"

In the *Loyd case,* supra, the court said:

> "He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed and *the right of Murray to command payment at once was of the very nature and essence of the transaction.*"

In the case at bar, the admitted facts show that there was no agreement between the petitioners and the bankrupts to treat their deposit of checks *as deposit of cash* nor *as an immediate credit.* The course of dealing between the parties establishes that they never as a matter of fact treated the deposits of the petitioners as deposits of cash or as an immediate credit, and that the petitioners never drew upon the bankrupts before the collection of said evidences of debt as were deposited by them with the bankrupts. Hence, the deposits by the petitioners of their negotiable paper with the bankrupts, were never intended by them to constitute or be equivalent to a deposit of cash, nor as an immediate credit (R, 6, 7, 9, 22).

"The very nature and essence of the transaction" necessary to establish a relationship of debtor and creditor between a depositor and his bank are, thus, absent in the case at bar.

This being the intention of the parties two things follow:

1. That the *Burton case* and the cases preceding and following it, dealing with the deposit of checks treated as cash, do not apply to the facts at bar.

2. That the implication of law arising where checks are deposited as cash is excluded here by the intention of the parties that the deposits herein should not be treated as cash or as an immediate credit.

It was so held by this court and the New York Court of Appeals (see our main brief, pp. 66-70) in

St. Louis & San Francisco Ry. Co. v. *Johnston,* 133 U. S., 566, 573, 574;
Scott v. *Ocean Bank,* 23 N. Y., 290, 291.

D.

Replying to respondent's argument.

The respondent quotes Special Master to the effect that there was burden upon the petitioners to prove a *special agreement,* showing that they had no right to draw before collection (Its Brief, p. 20). The opinion of the Special Master presents unquestionably an erroneous view point of law. He has adopted wholesale the erroneous doctrine of the respondent that there is a general presumption in favor of the debtor-creditor doctrine and that there was a duty upon the petitioners to rebut that presumption and that it could not be rebutted in any other way except by the proof on the part of the petitioner of *a special agreement,* showing that they had no right to draw before collection. This point of view was rejected by the District Court and the Circuit Court of Appeals, and is clearly untenable in view of the previous discussion herein of these questions of law.

In support of Master's opinion respondent cites a portion from the judgment of Hand, C. J., *In re Jarmulowsky,*

243 Fed., 632, but judiciously omits the most material part of said quotations which commences as follows:

> *"The banks right,* however, depends upon the depositor's immediate and unconditional right and not merely as a favor to draw upon the deposit * * *."

It is clear that Hand, C. J. (then D. J.), put the burden of proof *upon the bank* and not upon the depositor as the respondent wants this court to believe.

As Pitney, J., said in *Perth Amboy Gas Light Co.* v. *Middlesex County Bank,* 60 N. J. Eq., 84, 90:

> "If a depositor deposits a check or draft on a third party * * * *in the absence of an understanding* * * * *it is a mere bailment."*

In its eagerness to fasten upon the petitioners the non-existing burden of proof, the respondent alleges that:

> "Petitioners have failed to sustain the burden of proving *the absence of such right."*

Since when under our system of pleading and proof, a claimant must establish a *negative fact.*

This is not a case where negotiable instruments, *generally* endorsed, are deposited by customer with his bank to his current checking account. In this case negotiable instruments, *restrictively* endorsed, were deposited with the bank by third parties either on or without instructions to do so emanating from the depositor. Hence, *prima facie,* the deposit herein is restrictive and the title remains in the depositor until the proceeds of said deposit are collected by the bank and mixed with its general funds.

If the respondent, who stands in the shoes of the bankrupt bank, desires to show that for some reason the words of restriction could have been disregarded by the bankrupts, the burden is upon it to establish this fact by prov-

ing, *inter alia,* that the petitioners had an immediate and unconditional right to draw upon their deposit of negotiable instruments with the bankrupts before the bankrupts collected the proceeds thereof.

In conclusion of its Point I respondent concedes that the restrictive instructions accompanying the checks herein were not present in the *Burton case,* but contends that said instructions were not meant to be used as words of limitations under the peculiar circumstances of the present case. To avoid repetition we will discuss this matter under the next point. Here, we merely wish to point out the inconsistency of the respondent. In trying to fasten upon the petitioners the debtor-creditor doctrine it ignores and rejects the circumstances and the course of dealing between the parties herein, but in attacking a settled meaning of restrictive expressions used in connection with the checks at bar, it relies on the circumstances and course of dealing in attempting to convince this court to vary said settled restrictive meaning and to impart to it a fanciful interpretation unsupported by the facts herein.

POINT THREE.

Both the surrounding circumstances and the settled legal and banking meaning of the expressions "for account of" and "favor of" establish beyond any doubt that said expressions were used herein in their customary restrictive sense.

Since the argument of this case in the Circuit Court of Appeals, the respondent made considerable progress toward acknowledging as still in force the doctrine announced by this court in *White* v. *Miner's National Bank,* 102 U. S., 658, and in the cases preceding and following it.

The respondent now concedes (its brief, p. 25), that the expressions "account of" or "favor of", when used in

connection with negotiable instruments, imply restriction upon their negotiability, but still contends that the *White* case and the subsequent cases do not apply to the facts at bar for either or all of the following reasons:

(1) That in the *White* case and the subsequent and preceding cases the court dealt with the use of the restrictive terms "account of" and "favor of", as a part of the endorsement, and had to determine the rights as between the endorsers. In this case the words of restriction are not used on the back of the negotiable instruments but either on the face or in the accompanying written instruments and that the parties before the court are not endorsers but the payees and their depositor.

(2) That although the settled legal meaning of "account of" and "favor of" is restrictive and the expressions are unambiguous, the court must take into consideration the circumstances surrounding the delivery of the negotiable instruments herein in determining the meaning of those expressions in the case at bar.

(3) The circumstances surrounding the delivery of negotiable instruments in this case show that said expressions of restriction were not used by the parties herein in their customary sense and established legal meaning.

We will now consider *seriatim* the respondent's argument as outlined above.

A.

The expressions "account of" and "favor of" have restrictive meaning whenever used, said meaning not being limited to negotiable instruments. They remain such whether used between endorsers or a bank and its depositor.

A considerable part of respondent's argument is devoted to attacking the decision in the *White* case (*supra*), and the opinion of the Circuit Court of Appeals, on the ground that in the *White* case the court dealt with an inscription

on the back of the negotiable instrument, and that the Circuit Court of Appeals used the word "endorsement" in its larger sense, and not in its limited sense, to wit, that of an assignment of a negotiable instrument.

We have shown in our main brief (pp. 18 and 19), that an endorsement does not cease to be such because it happens to be written on the front of a negotiable instrument or in a memorandum accompanying the same, and cited many authorities in support of this position. A repetition of said argument here, which was not answered by the respondent, is deemed superfluous.

The expression "account of" and its companion expression "favor of" import restrictive meaning irrespective of their use. In other words, the very plainest meaning of these expressions is that something is being done for the benefit of some other party and not the parties who are the actors in any particular transaction.

On pages 18 to 32 of our main brief we have discussed at length the use of said restrictive expressions in the *White* case and cases preceding and following it in connection with negotiable instruments. All of these cases lay down the doctrine clearly stated by this court in the *White* case. It said at page 660:

> "*The plain meaning of it is,* that the acceptor of the draft is to pay to the endorsee *for the use of the endorser.* The endorsee is to receive it *on account of the endorser. It does not purport to transfer the title* or the ownership of the money when received."

In *Baranowsky* v. *Guaranty Trust Company,* N. Y. Law Journal (November 12, 1921), Mr. Justice Lehman (now of N. Y. Court of Appeals), said:

> "It has been frequently held that an indorsement of a negotiable instrument 'for the account' of the indorser makes the indorsee not the full owner of the instrument, but merely the indorser's agent for col-

lection. *From the very nature of the contract embodied in the negotiable instrument these words can have no meaning except that the party primarily liable on the instrument should pay them over only for the benefit of the person making the restrictive indorsement.*"

In *M'Kinstry* v. *Pearsall*, 3 Johnson (N. Y.), 319, New York Court of Judicature, then presided over by Kent, C. J., considered the effect of a receipt reading as follows:

> "Received of Captain E. Smith, 50 barrels of provisions, for account of David M'Kinstry.
>
> Robert Pearsall."

The court said at page 320:

> "With respect to papers of this kind, the courts have permitted the party to show mistake, fraud and imposition, in obtaining them. It is not necessary in this case to go so far, as *the receipt itself is perfectly equivocal;* and from the mere reading of it, no one could say whether the provisions were received to go on an account held by the defendant against the plaintiff or whether the defendant meant only to acknowledge that, though the provisions were received from Captain Smith, *they were received by the defendant for safe keeping, for or on account of David M'Kinstry. I should understand the receipt to import the latter,* for several reasons; because there is no sum mentioned at which they were received, *and because 'for account' denotes, with more propriety, the ownership of the property, rather than that they were received on an account against him.*"

We have never argued, as the respondent wants this court to believe (its brief, p. 25), that a word or phrase used under one set of circumstances always must have the same meaning, although used under wholly different

circumstances or for another purpose. We merely pointed out, and still urge upon this court, that the expressions "account of" and "favor of" in their very nature and taken in their simplest meaning imply that an act is being done by someone not as a principal actor but merely as an agent for someone else, and that the beneficial ownership or interest in the property subject to such an act is in the principal and not in the agent.

This matter was discussed at great length in our main brief at pages 29 to 32. We have stated there that in order to succeed in its argument the respondent must not only convince this court that said expressions were used by the New York banks or the petitioners not merely as indicative of the bookkeeping account to which the checks delivered by them to the bankrupts were to be charged, but that the proceeds of the checks in question were intended by them to be paid to the bankrupts *for the beneficial use of the bankrupts and not for the beneficial use of the petitioners.* That far, of course, the respondent cannot push its argument. Not being able to bring it to a logical conclusion it should have had the courage to acknowledge its futility and inapplicability to the facts at bar.

The respondent takes several pages of its brief to argue that there is a fundamental distinction between the case where restrictive instructions are used between endorsers or between a bank and its depositor. The respondent contends that in so far as the endorsers are concerned no question of the actual relationship between the endorsee and the third party exists, intimating that the endorsees in this case are the bankrupts and the third party the petitioners.

The endorsees in the case at bar were the bankrupts, to wit, a bank wherein a current checking account was maintained by a third party, to wit, the petitioners. The argument of the respondent loses sight of an undisputed fact that whatever might be the actual general understanding between a depositor and his bank the depositor is always at liberty to impart new terms (either more liberal or

more restrictive) to any particular deposit made by him to his said account from time to time.

The respondent takes it for granted that if an understanding is established between the bank and its depositor as to how his deposits are to be treated it is a sort of a permanent institution which could not be changed by either party in any particular instance. The assumption is, of course, contrary to the actual state of facts existing throughout the country between depositors and their banks and the law governing their relationship.

The depositor is always at liberty to accompany any deposit by such instructions as he may desire, and if his bank accepts the deposit it is bound by said instructions, its only privilege being to reject the deposit on the terms tacked on to it by the depositor.

> "Sec. 208. *Instructions accompanying a deposit, and coming from the proper authority, must be carefully attended to.* When the depositor orders his money to be put on one of his accounts, or to be applied to take up a particular check or note, or to be transmitted to a certain person, *or whatever special direction he may give,* the bank must obey it if it receives the deposit at all."
>
> *Morse on Banks & Banking* (5 Ed.), Vol. 1, page 439.

In the case at bar, assuming for the sake of argument but not conceding, that the New York banks acted merely as agents for the petitioners, the petitioners choose to tack on to their deposit restrictive directions in the case of the check for $1,294 by inserting the same in the text of the check, and in the case of the check for $15,000 by inserting the same in an accompanying memorandum. Accordingly, whether this court will consider the bankrupts and the petitioners as endorsers or as a bank and its depositor, the actual relationship between them in regard to this particular deposit is the same, to wit, the deposit was re-

strictive and the depositor retained beneficial ownership in the two checks in question until such time as the bankrupts collected the proceeds thereof through the clearing house. The moment the respondent admitted that the expressions "account of" and "favor of" are restrictive and are equivalent to a direction for collection (*Commercial Natl. Bank* v. *Armstrong*, 148 U. S., 57), it lost its case.

Unless the respondent takes the stand that a depositor who has a general checking account, can *never* deposit any negotiable papers to his account accompanied by a restrictive direction, such as "for collection" or "account of", etc., it fails in its argument. That extreme position the respondent found itself unable to take and thus failed in the acid test of the applicability of its argument to the facts at bar.

B.

Respondent seeks by surrounding circumstances not to explain but to directly contradict the restrictive meaning of the expressions "account of" and "favor of." Its authorities do not apply to the case at bar.

The respondent seeks to induce this court to consider the circumstances surrounding the delivery of checks in question by the National City Bank and Goldman-Sachs & Co. to the bankrupts, because these circumstances, in the opinion of the respondent, merely help *to explain* the meaning of said words and not to vary or contradict it.

What the respondent extensively seeks, through its so-called explanation, is to show that, although said expressions are unambiguous and their settled legal meaning is restrictive, they were used in the case at bar in a non-restrictive sense. If that is not a request to this court to vary and contradict by extraneous parol evidence written instruments, we do not know what request may so be, and a better situation where parol evidence rule should govern cannot be easily imagined.

The rule as to the introduction of surrounding circumstances to explain written instruments is stated in *Corpus Juris*, as follows:

> *"Accordingly where the instrument is clear and unambiguous on its face, and no intimation is given of a disclosure of a latent ambiguity, no evidence is admissible to give to it a construction other than that which is plainly expressed. It must be interpreted according to its terms, and it will be enforced without resorting to proof of the surrounding circumstances"* (22 C. J.), page 1189.

In support of this rule a mass of authorities are cited and some of the federal cases indicated are these:

> *Culver* v. *Wilkinson*, 145 U. S., 205;
> *Thompson* v. *Knickerbocker Life Ins. Co.*, 104 U. S., 252;
> *Meredith* v. *Picket*, 9 Wheat., 573;
> *Morris* v. *Chesapeake, etc., S. S. Co.*, 125 Fed., 62 (*Certiorari* denied, 203 U. S., 592);
> *United Eng., etc., Co.* v. *Broadnax*, 136 Fed., 351 (*Certiorari* denied, 197 U. S., 624).

In the *White* case (*supra*), this court held that the expression "account of" and its companion expression "favor of" are not ambiguous. It said at pages 660, 661:

> *"The language of the endorsement is without ambiguity and needs no explanation either by parol proof or by resort to usage. * * * If this be a sound view of the legal effect of the written endorsement, neither parol proof nor custom can be received to contradict it."*

In support of its said doctrine respondent cites the following cases:

U. S. v. *Bethlehem Steel Corp.* (1906), 205 U. S., 105;
Middleworth v. *Ordway* (1908), 191 N. Y., 404;
U. S. v. *Chamberlin*, 219 U. S., 250, 262;
Price v. *U. S.*, 269 U. S., 492;
Central Coal & Coke Co. v. *Good & Co.*, 120 Fed., 793, 799.

In *U. S.* v. *Bethlehem Steel Corp.* (*supra*), this court, as a reason for admitting surrounding circumstances to explain the contract under its consideration, said at page 118:

> "While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet *we think that much light is given as to the true meaning of language that is not wholly free from doubt* by a consideration of the correspondence between the parties before the final execution of the contract itself."

Thus, in this case the court admitted surrounding circumstances because in its opinion the meaning of the contract was not free from doubt.

In *Middleworth* v. *Ordway* (*supra*), the court said at page 414:

> *"Whether we ignore the word 'dower' altogether as meaningless,* or give it the definition that the parties gave it by using the phrase which they regarded as equivalent in meaning, the same result follows."

Hence, a resort was there had by the court to the surrounding circumstances, because, otherwise, the word "dower" would be meaningless.

In *U. S.* v. *Chamberlin* (*supra*), the court did not discuss the parol evidence rule at all. This court there considered the right of the Government to recover a personal judgment for stamp tax and whether an action for

debt could or could not be brought for its recovery. In that connection this court held that a tax would be a debt in the sense of common law if the statute creating the tax at the same time creates a personal obligation to pay the same. The case has no bearing whatever on the point involved in this appeal.

Price v. *U. S.* (*supra*), was a case similar to the Chamberlin case and the parol evidence rule was also not discussed by this court therein.

A careful reading of the opinion of the court in *Central Coke & Coal Co.* v. *Good & Co.* (*supra*), failed to disclose any reference therein to the parol evidence rule.

In several parts of its brief respondent argues at great length that it was necessary for the New York banks to indicate in some manner that the payments they desired to make were for the benefit of the petitioners.

> "How other than by the use of the words 'for account' could Goldman, Sachs have indicated to the bankrupts the name of the firm having an 'account' with them for whose benefit the check was being transmitted."

This court, of course, is not concerned with guessing what the New York banks could have said upon that occasion. We have shown in our main brief (pp. 12 to 18), that when words having a settled legal and commercial meaning are used they are presumed to have been used in that settled legal and commercial sense.

The court will also bear in mind that the transaction herein occurred between banks and the banks would naturally be presumed to know the banking and the legal import of the expressions used by them. In no sense they could be considered as laymen.

There are many expressions that the New York banks could have used which would not have restricted the beneficial interest in the checks herein, delivered by them to the bankrupts. We may suggest some of such expressions:

"We are paying the amounts of the checks herewith enclosed to Messrs. A. Latzko and N. Popper, of Budapest."

"Please credit the amount of the enclosed checks to A. Latzko and N. Popper, of Budapest."

"We are enclosing our checks in payment to Messrs. A. Latzko and N. Popper, of Budapest."

"Please acknowledge the receipt of our checks delivered to you by order of Messrs. A. Latzko and N. Popper, of Budapest."

"Please have the account of Messrs. A. Latzko and N. Popper, of Budapest, credited with the amount of the enclosed checks."

"Enclosed please find our checks, as per order of Messrs. A. Latzko and N. Popper, of Budapest."

"We are instructed by Messrs. A. Latzko and N. Popper, of Budapest, to remit to you the amount of the enclosed checks."

If, instead of using any of the above stereotyped sentences, the banks had used restrictive instructions, instructions that were not and are not ambiguous, no duty is thereby cast upon this court to change those instructions in the sense directly contrary to that given to them by settled legal and banking interpretation.

C.

The so-called "surrounding circumstances", relied upon by the respondent, do not oppose the restrictive meaning of the expressions "account of" and "favor of" used in connection with the checks herein.

The surrounding circumstances relied upon by the respondent which changes settled legal and banking meaning of expressions "account of" and "favor of" used in connection with the checks herein, are these: That the

deposit was made herein by the New York banks in the ordinary checking account of the petitioners with the bankrupts; that the instructions to place it in such an account emanated from petitioners (see its Brief p. 31).

The idea that the New York banks acted as the agents of the petitioners originated through an obvious error of the Circuit Court of Appeals in misreading the reclamation petition herein. The Court of Appeals stated in its opinion:

> "The petitioners state they caused Goldman, Sachs & Company, *as their agents*, to deliver it. The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners. This they did *as the agents* of the petitioners" (R., 84).

The paragraph in the reclamation petition which the court had in mind, is the Ninth reading as follows:

> "NINTH.—That on June 15, 1923, and on the same day as said petition in bankruptcy against said K. N. & K. was filed and said temporary Receiver was appointed, as aforesaid, petitioners caused Goldman, Sachs & Company to deliver to said K. N. & K., a check for Fifteen thousand ($15,000) Dollars, to be collected by said K. N. & K. for the account of petitioners, as aforesaid. That upon said date, petitioners likewise caused the National City Bank of New York to deliver to said K. N. & K. a check for One thousand two hundred and ninety-four ($1,294) Dollars, to be collected by said K. N. & K. for the account of petitioners, as aforesaid" (R., 8).

The court will see that the petitioners never asserted that they caused the New York banks to act *"as their agents"*. No such conclusion is warranted by the legal

interpretation of the word "caused". We have made a thorough search of the authorities and find none that permit said construction of said verb, as customarily used *in pleadings*. The Circuit Court of Appeals for the Ninth Circuit held that the verb "caused" means "occasioned" in

> *Williamsborough City Fire Insurance Co.* v. *Willard*, 164 Fed., 404, 406;
> *Hamilton* v. *Williamsborough City Fire Insurance Co.*, 157 Fed., 280, 284.

In *Louisville & N. R. Co.* v. *Smith*, 50 South, 241, 244, the court construed the verb "caused" used in a pleading as equivalent to "allowed."

In *Carroll* v. *Allen*, 27 Atl., 704, 705, the court said, speaking of the complaint:

> "*We do not think the word 'caused' in the above connection, necessarily implies active and affirmative misconduct* on the part of the town, its servants and agents, as contended by defendant's counsel. In other words, *we do not think it necessarily means that the town actually dug, or caused to be dug, in said highway, the hole in question*, but simply that the negligence of said town *resulted in or caused*, the defect in question, and hence that the objection thereto was not well taken."

The record conclusively shows that Goldman-Sachs & Company delivered their check for $15,000 by order of Julius Baer & Company, Zurich, Switzerland, in accordance with cable instructions from the latter (R., 31). The check of the Irving Bank-Columbia Trust Company was delivered to the bankrupts by order of Pester Ungarische Commercial Bank, Budapest, Hungary. We may assume that the National City Bank delivered its check to the bankrupts also by reason of similar instructions from one of its correspondent banks abroad. If any presumption

induced by the said facts is to be indulged in, it is that when checks are delivered to the payee or to his agents, such checks are intended to discharge some debt or obligation to such payee of the drawer thereof or of the party by whose order the checks were drawn.

Nay v. *Curley,* 113 N. Y., 575, 577;
Marks v. *Kellogg,* 170 A. D. (N. Y.), 464, 468: affirmed 220 N. Y., 615.

The second alleged "enlightening circumstance" relied upon by the respondent is the fact that the petitioners had a current checking account with the bankrupts. We are unable to see how this point in any way affects the right of a depositor or of third parties to make deposits to his account of negotiable paper accompanied by restrictive instructions, retaining the title in him until said negotiable instruments are collected by his bank through the clearing house.

Respondent asks that if petitioners delivered to the bankrupts actual cash money, for their account, would that deposit create any other relationship than that of debtor and creditor. The answer clearly is, no. But this answer does not depend on the fact that the petitioners had a current checking account with the bankrupts. It depends upon *the nature* of the deposit. When *cash money* is deposited or negotiable instruments are deposited *as cash money,* the relationship of debtor and creditor immediately arises. When negotiable instruments accompanied by restrictive instructions are deposited, the relationship of debtor and creditor does not arise between the depositor and his bank, until *"such bank performs the dual function of collecting and crediting"* (*American National Bank* v. *Miller,* 229 U. S., 517, 520). In the case at bar before the bankrupts performed this "dual function", to wit, before they collected the checks in question through the New York Clearing House, they failed and the proceeds of said checks never became part of bankrupts' es-

tate. Hence, the petitioners are entitled to reclaim the same in full from the trustee in bankruptcy.

It is further urged upon this court that depositor cannot retain the title to his deposit of negotiable instruments by stating that said deposit is "for his account". The contrary was repeatedly held both in this country and in England.

In *Lee* v. *Chillicothe Branch Bank* (No. 8186), 15 Fed. Cas., the District Court said, at pages 150-151:

> "Without stopping to analyze the many cases referred to, in which endorsements have been held to be restrictive in their character, as suspending the farther negotiability of commercial paper, the following instances may be briefly stated: '*pay to my use*', * * * '*pay the money to my servant for my use*,' * * * Chitt. Bills, 176, 177; Pyles, Bills 121 (marginal paging); Edw. Bills & N. 277, 278; Stor., Bills, Par. 211; 2 Burrows, 1227; Doug. 637; 8 Taunt., 100; 15 E. C. L., 319; 3 Mass., 227; 5 Mass., 544."

On appeal, the Circuit Court said (No. 8187), 15 Fed. Cas., at page 152:

> "Whether an endorsement be restrictive or not, depends upon the intention of the parties as expressed, 'pay to A for *my account*' 'pay the contents to *my use*'; 'pay to A. B., or order, for *my use*,' 'pay to A. B. for *my account*'; 'pay the money to *my use*'; 'pay the money to my servant for *my use*,'—these are specimens from cases where the endorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of restructions, the negotiability of the bill ceases. * * *"

There is not a *scintilla* of evidence in the record that any of the New York banks knew that the petitioners had

a current checking account with the bankrupts. On the other hand, it may be safely assumed that the shaky financial position of the bankrupts was known to the New York banks and they purposely used restrictive instructions when delivering their checks in order to safe-guard the interest of the petitioners in view of the impending bankruptcy of Knauth, Nachod & Kuhne.

In the *White* case, *supra*, this court held that the restrictive meaning of the words "for account of" is unquestionable, contains no ambiguity and cannot be contradicted either by parole evidence or by custom. We submit that no amount of speculative inferences may change the plain meaning of these words.

Mr. Justice Lehman (now of New York Court of Appeals), said in *Baranowsky* v. *Guaranty Trust Co.*, New York Law Journal, November 12, 1921:

> "It has been frequently held that an endorsement of a negotiable instrument 'for the account' of the indorser makes the indorsee not the full owner of the instrument, but merely the indorser's agent for collection. *From the very nature of the contract embodied in the negotiable instrument these words can have no meaning except that the party primarily liable on the instrument should pay them over only for the benefit of the person making the restrictive endorsement.*"

We refer this court to Point I in our main brief (pp. 12 to 18) where this aspect of the case is discussed at length and many authorities are cited in support of the standpoint of the petitioners.

Attempts to vary and explain said meaning have been made in the past and have uniformly failed. Thus, in *Sigourney* v. *Lloyd*, 8 Barnwell & Cresswell, 622, the court said per Lord Tenterden, at page 631:

> "It has been said that the endorsement 'pay to Williams for my use,' is a mere direction to Williams

to apply the money reduced by the bill to Sigourney's use; but the words taken in that sense would be useless; for whether the words be on the face of the endorsement or not, as soon as Williams received the proceeds of the bill, he must necessarily apply them to Sigourney's use, and place them to his credit in the account between them. So that those words will have no effect whatever, unless they have that of restraining the negotiability of the bill, or at least of having the first indorsee (if he takes the bill with those words on it, as Williams did in this case) a trustee for the original indorser."

On appeal, Lord Chief Justice West said in 3 Moore & Payne, at page 229:

"No inconvenience can possibly arise to the commercial interests of the country by limiting the operation of an endorsement so expressed. The only effect will be to make persons more cautious in transactions of this nature in the future."

Conclusion.

We may sum up the result of the foregoing discussion by stating that this court is called upon to decide in the case at bar, the two following main propositions:

1. Whether it is proper to import into the expressions "account of" and "favor of", having settled legal and banking unambiguous meaning, a sense contrary to its said settled restrictive effect, particularly where the record contains no facts opposing said restrictive meaning.

2. Is there a relationship of debtor and creditor or principal and agent between a depositor residing in Budapest, Hungary, and having a current checking account with a New York bank, when the depositor was not advised that certain checks were deposited for his benefit

with said New York bank; and said depositor had no agreement with said New York bank to treat the deposits of negotiable instruments to his account with said bank as deposits of cash, or as an immediate credit, never in fact treated any negotiable instruments deposited by him or in his behalf with said bank as cash, or as an immediate credit; never drew upon his said bank before the collection by said bank of negotiable instruments so deposited to his account, as aforesaid; at the time of the deposit of the negotiable instruments involved herein, he was not indebted to said New York bank but had a credit balance; and in this particular instance, did not desire an immediate credit and did not draw before the collection of the check herein involved by said bank immediately upon the deposit thereof.

We submit that the first of these questions should be answered in the negative and the second to the effect that the relationship of the principal and agent prevailed.

The judgment of the Circuit Court of Appeals should be affirmed in so far as it granted the reclamation claim of the petitioners to the proceeds of the check of the National City Bank, and should be reversed in so far as it denied said claim as to the proceeds of the check of Goldman-Sachs & Co.

Respectfully submitted,

CHARLES A. BRODEK,
BORRIS M. KOMAR,
Counsel for Alexander Latzko, et al.,
Petitioners in No. 48 and Respondents in No. 49.

(46529)

FILED
DEC 16 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 48.

ALEXANDER LATZKO, ET AL.,
Petitioners,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE IN BANKRUPTCY, ETC.,
Respondent.

No. 49.

THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE IN BANKRUPTCY, ETC.,
Petitioner,

against

ALEXANDER LATZKO, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

CHARLES A. BRODEK,
BORRIS M. KOMAR,
Counsel for Petitioners in No. 48,
and Respondents in No. 49,
No. 67 Wall Street,
New York City.

PRESS OF FREMONT PAYNE, 60 Washington Street, New York City.

Supreme Court of the United States

OCTOBER TERM, 1927.

Nos. 48 and 49.

In the Matter of OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE, Bankrupts, ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER, Petitioners-Respondents, THE EQUITABLE TRUST COMPANY OF NEW YORK, as trustee in bankruptcy, etc., Respondent-Petitioner.	*Petition for Rehearing.*

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper and Emil Hochstein, as co-partners doing business under the firm name and style

of N. Latzko and A. Popper, appellants in No. 48 and respondents in No. 49 (hereinafter referred to as petitioners) showeth unto your Honors that each being aggrieved by the decision rendered on the 21st day of November, 1927, by which your petitioners were found to be not entitled to the proceeds of certain two checks, one for $15,000 drawn to the order of Knauth, Nachod & Kuhne, bankrupts, by Goldman Sachs & Company, and another for $1,294.00 drawn to the order of said bankrupts by the National City Bank of New York, both of said checks constituting payments by said banks to the account of your petitioners;

Now, your petitioners respectfully state that the ground of their said grievance are as follows:

1. The court did not decide the only question involved in this appeal, to wit, *the effect of the course of prior dealing* between the petitioners and the bankrupts.

2. That said course of prior dealing *completely negatived* the "inference" that the relationship between bankrupts and petitioners was that of debtors and creditors.

3. That the prior course of dealing herein is more favorable to petitioners than that in the *Johnston* case, 133 U. S., 566, where this court held the relationship was *of agent and principal.*

4. In distinguishing the *Latzko* appeals from the *Rochling* appeal, the court relied on facts rejected by the petitioners and not on the prior course of dealing.

5. The distinction between the *Rochling* appeal and the *Latzko* appeals lies in the different prior course of dealing.

6. In deciding the *Latzko* appeals, the court overlooked the distinction between a mere *bookkeeping* credit and an *actual* credit.

7. The effect of mere bookkeeping credit was not argued by the parties to the Latzko appeals, and the decision of the court thereon is contrary to its decision in the *Johnston* case, *supra*, and other federal cases.

The above points are hereinafter discussed at length.

A. *That in deciding said appeals this court overlooked the main and only question involved therein, to wit, the course of dealing between the petitioners and the bankrupts.*

The petitioners concluded their reply brief by statement of major issues of law involved in these appeals (Reply Brief, pp. 37 and 38):

"1. Whether it is proper to import into the expressions 'account of' and 'favor of', having settled legal and banking unambiguous meaning, a sense contrary to its said settled restrictive effect, particularly where the record contains no facts opposing said restrictive meaning.

2. Is there a relationship of debtor and creditor or principal and agent between a depositor residing in Budapest, Hungary, and having a current checking account with a New York bank, when the depositor was not advised that certain checks were deposited for its benefit with said New York bank; and said depositor had no agreement with said New York bank to treat the deposits of negotiable instruments to his account with said bank as deposits of cash, or as an immediate credit, never in fact treated any negotiable instruments deposited by him or in his behalf with said bank as cash, or as an immediate credit; never drew upon his said bank before the collection by said bank of negotiable instruments so deposited to his ac-

count, as aforesaid; at the time of the deposit of the negotiable instruments involved herein, he was not indebted to said New York bank but had a credit balance; and in this particular instance, did not desire an immediate credit and did not draw before the collection of the check herein involved by said bank immediately upon the deposit thereof."

The first of the above issues was that based upon the doctrine of *White* v. *Miners National Bank*, 102 U. S., 658. The second of the above issues was that based upon the decision of this court in *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566.

The decision of this court in *Equitable Trust Co.* v. *Rochling*, rejected the applicability of the *White* case to the facts in the *Rochling* case and in these appeals. Hence, it became incumbent upon the court to consider the second major proposition presented by the Latzko appeals.

This court, in the *Equitable Trust Co.* v. *Rochling*, decided that in ascertaining the existence or non-existence of any express or implied agreements between the depositary and the bank, the prior course of dealing between them should be taken into account. The court there said:

"Ordinarily, where paper is indorsed without restriction by a depositor and is at once placed to his credit by the bank, *the inference* is that the bank has become the purchaser of the paper, and in making the collection is not acting as the agent of the depositor. (*Douglas* v. *Federal Reserve Bank, supra; Burton* v. *United States, supra; In re Jarmulowsky*, 249 Fed., 319, 321). * * *."

"Nothing in the previous course of dealing or in the actions of respondents indicates that they intended or had any reason for intending that Knauth, Nachod & Kuhne should take the paper as their agents for collection, or that any restriction should be placed

on the use of the checks by Knauth, Nachod & Kuhne once they had credited respondents."

The petitioners therefore conclude that this court has approved the interpretation of the decision in this court in *Burton* v. *United States*, advocated by the petitioners. Furthermore, this court in *Equitable Trust Co.* v. *Rochling* referred with approval to the decision of this court in *St. Louis & San Francisco Co.* v. *Johnston*, 133 U. S., 586. Despite the victory for the petitioners insofar as the law is concerned, the court entirely overlooked facts showing the course of dealing between the petitioners and the bankrupts herein, and, hence, arrived at a conclusion diametrically opposite to that warranted by the facts showing the prior course of dealing between them and the bankrupts.

B. *The "inference" that the relationship between bankrupts and the petitioners was that of debtor and creditor is completely negatived by the undisputed course of dealing between them.*

The effect of the uncontradicted prior course of dealing between the parties hereto was thoroughly discussed by the claimants both in their main and in their reply briefs. The main brief, Points Five and Six, and the Reply Brief, Point Two, deal conclusively and extensively with the course of dealing itself, and its effect upon the issues of these appeals. It was there shown that respondent conceded in these appeals that the appellants never treated any of their deposits as cash nor as an immediate credit, and never drew against their deposits before collection thereof by the bankrupts; that they did not so treat or draw against their deposit of checks in the particular instance involved herein; that the petitioners were not indebted to the bankrupts at any time, were not advised by the bankrupts of the crediting of said checks to their ac-

counts, and had no agreement with the bankrupts to treat their deposits as cash or as an immediate credit.

By stipulation of the parties, the petition of the claimants and the answer of the receiver were made the pleadings herein (R., 21). Therefore, by virtue of General Equity Rule No. 30, the following averments in the petition are deemed confessed by the Receiver:

> "That petitioners had no agreement with said K. N. & K. to treat evidences of debt deposited with said K. N. & K. for collection or otherwise as a deposit of cash, nor that any immediate credit should be given by said K. N. & K. to petitioners upon the receipt of such evidences of debt" (R., 6).
>
> "That petitioners did not treat evidences of debt deposited with said K. N. & K. for collection and otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K. N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K. N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K. N. & K." (R., 6, 7).
>
> "That your petitioners did not draw upon said K. N. & K. against said account as aforesaid, before the collection by said K. N. & K. of the moneys due upon such evidences of debt as were deposited by the petitioners herein to their account with said K. N. & K." (R., 22).
>
> "That at the time petitioners herein caused said checks hereinbefore described to be delivered to said K. N. & K. petitioners had a credit balance with said K. N. & K. amounting to several thousand dollars and were not then and have not been at any time since then, and are not now, indebted to said K. N. & K. or to said Receiver" (R., 9).

The conceded facts as to the prior dealing between the bankrupts and the petitioners required the court's decision whether or not the same did or did not negative the inference that the relationship of debtor and creditor was established between them each time the petitioners made a deposit of negotiable instruments to their account with the bankrupts. This is the only question which the court had to decide in this case, after it rejected the applicability of its decision in the *White* case to the facts at bar. In overlooking this sole point, the court entirely failed to decide the appeal and the only question of law involved therein.

C. *The facts at bar are undistinguishable from St. Louis & San Francisco Ry. Co.* v. *Johnston, 133 U. S., 566, approved by this court in Equitable Trust Co.* v. *Rochling.*

In *Equitable Trust Co.* v. *Rochling Bros.,* this court said:

> "The proceeds of the two checks concededly have come into the hands of the petitioner, the bankrupts' trustee, and the sole question presented is whether the bankrupts on receipt of the check and before the filing of the petition in bankruptcy became the owners of them, or whether, as the Court of Appeals held, Knauth, Nachod & Kuhne were respondents' agent to collect them. If the former, respondents were creditors of the bankrupts (*Douglas* v. *Federal Reserve Bank,* 271 U. S., 489; *Burton* v. *United States,* 196 U. S., 283), entitled to share only on an equal footing with other creditors. If the latter, respondents were entitled to reclamation from the petitioners, since the checks had not been collected at the time of the petition in bankruptcy (*St. Louis & San Francisco Ry.* v. *Johnston,* 133 U. S., 566; *White* v. *Stump,* 266 U. S., 310, 313; Bankruptcy Act, sec. 10 [a], chap. 641, 30 Stat. 565 as amended; section 16, chap. 487, 32 Stat., 800)."

What facts showing the prior course of dealing do or do not negative the "inference" that the relationship of debtor and creditor arises between depositor and his bank upon a deposit of negotiable instruments to the depositors account with such bank were considered by this court in *St. Louis & San Francisco Ry. Co.* v. *Johnston*, and it was there decided that the prior course of dealing as established by the facts there proven destroyed any "inference" that the relationship of debtor and creditor there existed between the bank and its depositor.

The facts at bar showing the prior course of dealing between the claimants and the bankrupts are identical with those in the *Johnston* case. It is hardly possible to find a case more similar on the facts, than the Latzko appeals and the *Johnston* appeal. This aspect of this petition is discussed at greater length at Point I of the argument hereto annexed. The decision of this court in this case constitutes a complete overruling of its decision in the *Johnston* case without any discussion of the *Johnston* case and without consideration of the facts surrounding the deposit and showing the prior course of dealing between the petitioners and the bankrupts, although the matter was properly brought to the attention of the court both in the briefs filed by the petitioners and during the oral argument in their behalf, and although the *Johnston* case was approved by this court in the Rochling decision handed down at the same time as its decision in this case.

D. *The court in its opinion erroneously omitted to consider the course of dealing as a distinguishing feature of these appeals from the Rochling appeal, but relied on facts rejected by the petitioners as constituting such difference.*

In the Latzko appeals this court said:

> "Two circumstances *are said by claimants* to distinguish this case from No. 34, *Equitable Trust Com-*

> *pany* v. *Rochling, et al.*, just decided. The first is the fact that the check involved in the claimants' petition was not a cashier's check, but the check of a bank drawn upon its own bank of deposit. * * * It is suggested also that although it was the practice of the bankrupts to credit checks to claimants as soon as deposited, it does not affirmatively appear that claimants asked or expected them to be credited in advance of collection or that the items were listed as immediately entitled to interest."

The first of said circumstances said to be claimed by claimants (petitioners here) was expressly repudiated by them (Reply Brief, p. as a controlling fact.

As to the second circumstance mentioned by the court the record at bar in these appeals contained nothing whatsoever showing or suggesting that "it was the practice of the bankrupts to credit checks to claimants as soon as deposited." The only evidence on the point is that at Record, 25, where it is said:

> "It is further stipulated by and between the parties hereto that Latzko & Popper, the petitioner herein, were credited, on the books of K. N. & K., as of June 15, 1923, with the two checks deposited for their account in the respective amounts of $15,000 and $1,294."

In other words, there is only evidence of a *mere bookkeeping credit*, given *in this particular instance* to the petitioners by the bankrupts. This court held in the *Johnston* case, *supra*, that such bookkeeping credit does not divest the depositor of title to the negotiable paper deposited by him to his account with his bank. On the other hand, in pointing out the material differences in fact between the Rochling and the Latzko appeals we stated on page 8 of our main brief:

> "(d) It does not appear in the Rochling case that Rochling Brothers did not treat their deposits as a deposit of cash or as an immediate credit to them; nor did it appear that Rochling Brothers never drew upon the bankrupts against their deposits before the collection by the bankrupts of negotiable instruments deposited with them by Rochling Brothers."

We assigned as the error of the Circuit Court of Appeals inter alia, the following:

> "2. The Circuit Court of Appeals erred in disregarding the admitted course of dealing between the petitioners and the bankrupts."

It therefore follows that these appeals were decided by the court on distinctions not relied upon by petitioners and the real distinguishing facts relied upon by the petitioners were overlooked by the court and not considered by it.

E. *The effect of a mere bookkeeping credit by the bank as distinguished from an actual credit was not argued by the parties to this appeal.*

The decision at bar was made on the ground that although the established and undisputed course of dealing between the parties hereto showed that neither the petitioner nor the bankrupts treated the deposits of negotiable paper by the petitioners to their account with the bankrupts as a deposit of cash or as an immediate credit opened to the petitioners, mere bookkeeping credit of the amounts of the checks deposited under this course of dealing, transferred the title to the proceeds thereof to the bank. This holding is directly contrary to the holding of this court in the *Johnston* case, supra, where the bank not only gave credit to the depositor on its books, but entered the credit in the depositors pass book. In the case at bar, the depositors had no knowledge whatsoever of the bookkeeping

operations of the bankrupts. The *Johnston* case has never been doubted to be good law on the point that *mere book-keeping credit* as distinguished from the *actual* credit does not transfer title to the check. It is supported by prior and subsequent authorities to the same effect, all which the decision of this court squarely overrules without discussion or consideration. The point was not discussed either in the briefs of the petitioners or in that of the respondent because it seemed to be well established and beyond any question. The matter is discussed at a greater length in Point II of the argument hereto annexed.

Your petitioners in asking for rehearing do not dispute a single conclusion of law arrived at by this court in the *Equitable Trust Co.* v. *Rochling*, but your petitioners contend that apparently owing to the fact that both cases were decided simultaneously, the material distinction in the course of dealing shown by the appeals of your petitioners and the Rochling appeal was overlooked and the main and only issue, to wit, whether the facts at bar showing the prior course of dealing between the petitioners and the bankrupts completely negatived the inference that the relationship of creditor and debtor arose between them upon the deposit of checks in question, was not decided by this court.

WHEREFORE your petitioners humbly pray that Your Honors will grant a rehearing, respectfully submitting to such orders as the court may make in the matter.

Dated, New York, the 26th day of December, 1927.

ALEXANDER LATZKO,
WILLIAM LATZKO,
CHARLES LATZKO,
SAMUEL POPPER,
EMIL HOCHSTEIN,

By BRODEK & RAPHAEL,
Attorneys-in-Fact.

Certificate of Counsel.

I, Borris M. Komar, an attorney and counselor-at-law of the several courts of record in the State of New York and of the above court, do hereby certify that as one of the counsel for the petitioners named in the foregoing petition, I have examined the proceedings against them, and the opinion of the above court rendered on the 21st day of November, 1927, and carefully inquired into the matters set forth in their foregoing petition, and I believe the same are true and that the foregoing petition is presented in good faith and not for delay.

Dated, New York, the 15th day of December, 1927.

BORRIS M. KOMAR,
Counsel for Petitioners.

ARGUMENT.

POINT I.

The facts in the case at bar are undistinguishable from those in St. Louis & San Francisco Ry. Co. v. Johnston.

The uncontradicted course of dealing between the parties hereto completely negatived the inference that the relationship of debtor and creditor was contemplated to arise between them before actual collection of negotiable instruments deposited by petitioners to their account with the bankrupts.

In *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566, this court considered a course of dealing identical with that in the case at bar, and it decided that the relationship existing on those facts between the depositor and the bank was that of principal and agent and not creditor and debtor.

The *Johnston* case, just as the present case, arose upon appeal from the United States Circuit Court for the Southern District of New York. The reported statement of facts contained in the opinion of Wallace, C. J., in the *Johnston* case, is as follows (27 Fed., 243, 244):

> "Wallace, J.: The proofs show that for several years prior to the fifth day of May, 1884, the plaintiff kept an account with the Marine National Bank of the City of New York, making deposits with and drawing checks upon the bank from time to time. On the fifth day of May, 1884, the plaintiff deposited with the bank a sight draft * * *. On several occasions during the time the plaintiff kept an account with the

bank the plaintiff deposited similar paper at the same time with money and the bank credited the plaintiff upon its books and also upon the pass book of the plaintiff with the amount of such paper as a cash item. * * * *The plaintiff has never drawn against the credits given for sight drafts, but never had occasion to do so. There was no express arrangement or understanding between the plaintiff and the bank that such deposits should be treated as cash.* When the draft in suit was deposited it was sent to the bank by a messenger boy, but the plaintiff's pass book was not sent, having previously been left with the bank for the purpose of being written up. *The amount of the draft was credited by the bank on its own books to the plaintiff as a cash item,* but it was not entered in the pass book of the plaintiff until after the failure of the bank, and then without the plaintiff's knowledge."

We have taken the statement of facts by the court below because it is fuller than the statement of facts made in the opinion of this court, and because it was more favorable to the bank in whose favor the decision was made by Wallace, C. J., but which decision was reversed on appeal to this court.

If we substitute the dates and the names of the parties involved in this case, we will get almost a complete statement of facts at bar:

> The proofs show that for several years prior to the fifteenth day of June, 1923, the plaintiffs kept an account with Knauth, Nachod & Kuhne of the City of New York, making deposits with and drawing checks upon the bank from time to time. On the 15th day of June, 1923, the plaintiffs deposited with the bank two checks * * *. On several occasions during the time the plaintiffs kept an account with the bank, the plaintiffs deposited similar paper and the bank credited the

plaintiff upon its books, with the amount of such paper as a cash item. * * * *The plaintiffs have never drawn against the credits given for checks, but never had occasion to do so. There was no express arrangement or understanding between the plaintiffs and the bank that such deposits should be treated as cash.* The amount of the checks was credited by the bank on its own books to the plaintiff as a cash item (R., 6, 7, 9 and 22).

The facts at bar are stronger than those in the *Johnston* case, inasmuch as no deposit book was issued by the bankrupts to the petitioners; no notice was given to the petitioners of the credit in the books of the bankrupts nor an entry was made to that effect in any pass-book; no interest was allowed by the bankrupts on the credit balances of the petitioners; and the petitioners did not even have knowledge or information that the deposits desired by them were actually made by the New York banks; nor was there any evidence to show that the bankrupts ever allowed overdrafts to the petitioners, nor did they ever deposit cash.

This court in the *Johnston* case said at pages 573 and 574:

> "*This was not consistent with the theory of an understanding between the bank and the Company that the title to this and similar drafts should pass absolutely to the bank.* If the draft had not been paid, the bank could have canceled the credit, as it clearly accepted no risk on the paper. *The draft was entered at its full value, which indicated that it was not discounted, but credited for convenience and in anticipation of its payment. * * * If, under the circumstances disclosed in this case, the only balance the San Francisco Company had was made up of the deposit of this draft, and it had drawn against it, and the bank had declined to honor the check, could the San Francisco Company have sustained an action on the ground of a*

general commercial usage, when by the course of dealing for five years it had never drawn against paper so deposited? Because banks often let good customers overdraw, do the latter thereby get the right to do so when the bank deems it improper to permit it? Undoubtedly if the San Francisco Company had overdrawn, and this draft had been credited to cover the over-draft, or if the Company had drawn against the draft, the bank could hold the paper until the account was squared. And if the bank had transferred the draft to one occupying the position of a bona fide holder, such transfer would have conferred title on its transferee by reason of its reputed ownership so far as the latter was concerned. *Metropolitan National Bank* v. *Loyd*, 90 N. Y., 530."

At page 575, this court, relying upon New York and English cases, said:

"And in *Scott* v. *Ocean Bank*, 23 N. Y., 289, it was held that '*the property in notes or bills* transmitted to a banker by his customer to be credited the latter, *vests in the banker only when he has become absolutely responsible for the amount to the depositor*,' and that '*such an obligation*, previous to the collection of the bill, *can only be* established by a contract to be expressly proved or *inferred from an unequivocal course of dealing.*"

"'Every man who pays bills not then due into the hands of his banker,' said *Lord Ellenborough* in *Giles* v. *Perkins*, 9 East, 11, 14, 'places them there as in the hands of his agent to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case, he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance.'"

> *"If there be no bargain that the property should be changed, the relation resembles that of principal and agent. Mere liberty to draw does not make out such a bargain, particularly where interest is allowed by the banker upon the bills only from the time when their amount is received. Ex parte Barkworth,* 2 De. G. & J., 194; *Thompson* v. *Giles,* 2 Barn & C., 422; *Ex parte Sargeant,* 1. Rose, 153."

There was no such bargain made in the Latzko case, nor any interest allowed on petitioners' balances.

The checks at bar were not discounted, were not used to square an overdrawn balance against the petitioners with the bankrupts, and were not drawn upon by the petitioners. The rule for ascertaining the effect of a prior course of dealing upon the title to a deposit of negotiable instruments by the depositor to his account with the bank was correctly stated by Wallace, C. J., in the court below (27 Fed., 243, 245):

> "When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances."

In the *Johnston* case, the uniform practice of the parties in their past dealings was *not* to treat the deposits of paper as cash or as an immediate credit. For that reason this court reversed the decision of the Circuit Court for the Southern District of New York in that case. The same state of facts exists in the appeals at bar and constitutes the distinguishing feature of the *Johnson* and *Latzko* cases from those of *Burton* v. *United States,* 196 U. S., 283, *Douglas* v. *Federal Reserve Bank,* 270 U. S., 489, and *Equitable Trust Co.* v. *Rochling Bros.,* where no such prior course of dealing was established by the evidence.

POINT II.

Mere bookeeping credit does not transfer title to the check. Under the course of dealing herein, the crediting of the checks herein was a mere bookkeeping entry.

Despite the uncontradicted prior course of dealing between the petitioners and the bankrupts showing that neither the bankrupts nor the petitioners treated the petitioners' deposits of negotiable instruments as cash, before the collection thereof, this court stated that the dominant fact constituting the objective of the petitioners was the arrangement of the credit with the bankrupts and that result was achieved when a bookkeeping credit was given by the bankrupts to the petitioners.

Assuming that the establishment of an *actual* credit with his bank is an objective of any depositor, and, therefore, was that of the petitioners herein, no *actual* credit is established by mere bookkeeping entry which is not communicated by the bank to the depositor, is not entered in the depositor's pass-book and against which (as the established course of prior dealing shows) the depositor did not intend to draw, and the bankrupts did not expect them to draw.

When this court on a prior occasion had to pass upon a similar point upon almost similar facts, it said in *St. Louis & San Francisco Ry. Co.* v. *Johnston*, 133 U. S., 566, on pages 575 and 576:

> "The question was one of fact rather than of law, and we think *there should be something more in the evidence* tending to establish that the San Francisco Company understood that the bank had become owner of the paper, *than these mere credits for convenience*, before that can be held to be the fact, notwithstanding

it may be a recognized usage to allow a customer to draw. *So far from there being shown an unequivocal course of dealing tending to support that conclusion, it seems to us the tendency of the evidence is otherwise.*"

The decision of this court in the *Johnston* case holding that bookkeeping credits "for convenience" of the bankers do not constitute transfer of title to negotiable instruments does not stand alone, but is supported by other cases.

In *First National Bank* v. *Armstrong*, 42 Fed., 193, the court after referring to *Fifth National Bank* v. *Armstrong*, 40 Fed., 46, said at page 196:

> "In that case the credit was, as in this case, conditional, and not as it was in *First National Bank of Elkhart* v. *Armstrong*, 39 Fed., 231, unconditional; *and there was wanting the agreement which was found to exist in the Elkhart Bank case that the credit should be as cash, and that the Elkhart Bank should have the right to draw upon the same as cash.*"

In *Armstrong* v. *Second National Bank*, 38 Fed., 833, the court said at page :

> "In the absence of a distinct understanding on this point, the charge against the Fidelity bank *and credit to itself by the defendant of the amount of the check cashed would be provisional merely, and subject to be corrected if the check was dishonored.*"

In *Levi* v. *National Bank*, 5 Dillon, 104, the court said at page 111:

> "*It is not unusual for bankers to credit* their correspondents or customers with the amount of paper of

a certain character at the time of its receipt for collection, *but such credits are provisional only*, being made in anticipation that the paper will be promptly paid, with the right to cancel the credit if the paper is dishonored (*Trinidad National Bank* v. *Denver National Bank*, 4 Dill., 290). Such was the nature of the credit made in this instance, *and the circumstances is immaterial, as it does not vary the ultimate rights of the parties.*"

In *Manufacturers' National Bank* v. *Continental Bank*, 148 Mass., 553, 558, the court said:

"Under this arrangement *the credit given for a check was merely provisional* until the check was paid. *It did not create a debt from the Fidelity National Bank to the plaintiff, and it did not change the ownership of the check. Levi* v. *National Bank*, 5 Dillon, 104. *Balbach* v. *Frelinghuysen*, 15 Fed., 675. In that respect their relations to each other were very different from those between a banker and a depositor, *where checks are received on deposit as cash, and an absolute right to draw against them is given.*"

The banks are daily transacting an enormous amount of business, and have to use settled and well understood methods of bookkeeping and internal management which would prevent confusion and aid them in orderly transaction of their affairs. When the bank receives deposits it has to enter them somewhere in order to keep trace of the operations of each of its customers. It is the universal custom of all banks to enter all deposits of the customer in his account as and when the same are made, because otherwise, it cannot keep track of them. No bank keeps two books of account for each customer. Every bank has only one ledger. Whether the bank takes or does not take title to the negotiable instruments deposited with it by the

customer, depends on either an express arrangement or that implied from the course of dealing between the bank and the customer. It is indispensable for the bank as a matter of bookkeeping necessity to enter the deposits of the depositor as a credit in his account, immediately the deposit is made, but such action on the part of the bank does not amount to an *actual* credit opened by the bank to the customer. As this court said in *Commercial National Bank* v. *Armstrong*, 148 U. S., 57, at page 58:

> "No mere bookkeeping between the Fidelity and its sub-agent could change the actual status of the parties or destroy rights which arose out of the *real facts* of the transaction."

In the *Equitable Trust Co.* v. *Rochling*, this court refused to assign to the expressions "for account of" the meaning which the court deemed would be contrary to the course of business and banking usage in general. It there said:

> "But it was indispensable to the completion of the transactions that the bankrupts should be advised to what account the checks were to be credited. And it was apparently the function of the words in question to tell them.
>
> That alone, we think, was their purpose. To assign them any other would be to ignore the course of business followed here and banking usage in general, and to give them a strained and unnatural construction."

We respectfully submit that the settled course of dealing here entirely eliminates the possibility that the bookkeeping entry herein amounted to the actual credit. And in view of a business necessity for the banks to credit all items that are deposited by their customers in the accounts of the customers and the settled banking usage sanctioned by numerous decisions, distinguishing bookkeeping credit

from the actual credit, there is no warranty under the uncontradicted course of dealing between the petitioners and bankrupts herein, to elevate a mere bookkeeping practice into the transfer of title not desired and not intended by the parties to the transaction.

That the petition for rehearing be granted.

Dated, New York, 15th day of December, 1927.

Respectfully submitted,

CHARLES A. BRODEK,
BORRIS M. KOMAR,
Counsel for Alexander Latzko, et al., Petitioners in No. 48 and Respondents in No. 49.

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No. 11[redacted] [redacted] 49

Supreme Court of the United States,

OCTOBER TERM, 1925.

IN THE MATTER

of

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH AND THEODORE W. KNAUTH, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF KNAUTH, NACHOD & KUHNE,

Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER AND EMIL HOCHSTEIN, AS CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF N. LATZKO AND A. POPPER,

Petitioners,

MIDDLETON S. BORLAND,

Respondent.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GODFREY GOLDMARK,
Counsel for Respondent and Cross Petitioner,
74 Broadway,
New York City.

The Bunting Print Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1925.

IN THE MATTER

OF

OSCAR L. GUBELMAN, JAMES F. SHAW, ROLLIN C. NEWTON, HERBERT B. SMITHERS, JOHN R. HALL, MARY W. KNAUTH and THEODORE W. KNAUTH, individually and as co-partners doing business under the firm name and style of KNAUTH, NACHOD & KUHNE,
Bankrupts,

ALEXANDER LATZKO, WILLIAM LATZKO, CHARLES LATZKO, SAMUEL POPPER and EMIL HOCHSTEIN, as co-partners doing business under the firm name and style of N. LATZKO and A. POPPER,
Petitioners,

MIDDLETON S. BORLAND,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Equitable Trust Company of New York, as Trustee in Bankruptcy of Knauth, Nachod Kuhne, respectfully shows:

1. The above named Middleton S. Borland departed this life on March 23, 1926. At a meeting of creditors of Knauth, Nachod & Kuhne, duly held on April 9, 1926, your petitioner was duly elected Trustee in Bankruptcy of said bankrupts and has duly qualified as such.

2. Your petitioner respectfully shows that the questions of law presented upon the present application are the same as those in the application for a writ of *certiorari* made by your petitioner's predecessor in case No. 1069 entitled Middleton S. Borland as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, petitioner, against Carl Rochling *et al.*, trading as Gebr. Rochling, respondents, which application is pending before this Court.

3. The reclamation petition in the present case involved three checks alleged to have been collected after the bankruptcy herein. As to one of them, the check for $3,000.00, the Master found and the Circuit Court of Appeals sustained the finding that collection of this check had been effected prior to the bankruptcy. This conclusion is not sought to be reviewed by either party to the proceeding. As to the two other checks which were collected after the bankruptcy proceedings the Circuit Court of Appeals affirmed the courts below and denied the reclamation petition with respect to the proceeds of the check for $15,000.00, and, reversing the courts below, allowed the reclamation petition for the proceeds of the check for $1,294.00.

4. The distinction laid down by the Circuit Court of Appeals between the transaction involving the $15,000.00 check and that involving the $1,294.00 check presents the same questions of law as are raised in the application for a writ of *certiorari* in case No. 1069 above referred to.

5. Latzko *et al.* have filed a petition in the present case to review the decision of the Circuit Court of Appeals dis-

allowing the reclamation claim for the proceeds of the said check for $15,000.00 and your petitioner, the Trustee in Bankruptcy, files this cross-petition praying for a writ of *certiorari* to review the decision of the Circuit Court of Appeals in so far as it allows the reclamation petition with respect to the proceeds of the check for $1,294.00, to the end that the decision of the Circuit Court of Appeals may be reviewed in all its aspects.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued herein to review so much of the decision of the Circuit Court of Appeals for the Second Circuit as reverses the order of the United States District Court for the Southern District of New York denying the reclamation petition herein, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

THE EQUITABLE TRUST COMPANY OF NEW YORK
As Trustee in Bankruptcy of
Knauth, Nachod & Kuhne
by GODFREY GOLDMARK,
Counsel.

UNITED STATES OF AMERICA,
District of Columbia, } ss.:

GODFREY GOLDMARK, being duly sworn, deposes and says: I am counsel for The Equitable Trust Company of New York, Trustee in Bankruptcy of Knauth, Nachod & Kuhne, the aforesaid petitioner. I have read the foregoing cross-petition and the same is true.

GODFREY GOLDMARK

Sworn to before me this 17
day of April, 1926.

Anna DeGalia

Notary Public

My commission expires Dec. 13, 1926.

Certificate of Counsel.

I hereby certify that I have examined the foregoing cross-petition and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

GODFREY GOLDMARK,
Counsel for Petitioner.

FILED
SEP 27 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 48

ALEXANDER LATZKO, *et al.*, trading as Latzko & Popper,
Petitioners,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Respondent.

No. 49

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

against

ALEXANDER LATZKO, *et al.*, trading as Latzko & Popper,
Respondents.

BRIEF FOR RESPONDENT-PETITIONER

GODFREY GOLDMARK,
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GODFREY GOLDMARK,
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Supreme Court of the United States

OCTOBER TERM—1927.

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc., Petitioner, *against* ALEXANDER LATZKO, *et. al.*, Respondents.	No. 49

Brief for The Equitable Trust Company of New York, as Trustee in Bankruptcy.
Respondent in No. 48.
Petitioner in No. 49.

Statement.

Two writs of certiorari were granted by this Court to review the determination of the Circuit Court of Appeals for the Second Circuit. In both cases Alexander Latzko,

et al. in their brief refer to themselves as "petitioners" and to The Equitable Trust Company of New York, Trustee in Bankruptcy, as "respondent." For convenience that terminology has been adopted in this brief. The italics throughout this brief are inserted by counsel, unless otherwise noted.

The relation of these Cases to No. 34. The Equitable Trust Company of New York, etc., Petitioner, v. Carl Rochling, et al, Respondents.

Essentially the present cases present the same questions as are presented in No. 34, viz., whether prior to the filing of the petition in bankruptcy the bankrupts acquired title to certain checks received by them on June 15th, 1923, the day before the filing of the petition in bankruptcy, or whether the checks were received only for collection, with the result that the proceeds of the checks collected from the drawer after the bankruptcy belong to the petitioners. There are certain differences in the facts between these cases and that of *The Equitable Trust Company* vs. *Rochling*, No. 34, but it will be shown that the same principles must control the disposition of all the cases.

The Facts.

The petitioners, who are international bankers with headquarters in Hungary, maintained an ordinary checking account with the bankrupts (fol. 81).

Goldman, Sachs & Company Check.

On June 15th, 1923, the day prior to the filing of the petition in bankruptcy, the petitioners "caused" (fol.

22) Goldman, Sachs & Company to deliver the latter's check to the bankrupts for $15,000 drawn on the Bank of America payable to the order of the bankrupts. That check was accompanied by a separate communication that the check was "for account of Latzkopper Budapest" (fols. 91, 92). On receipt of the check on June 15th the bankrupts promptly credited petitioners' account with the amount thereof (fol. 93) and in turn deposited the check in the regular course of business with the American Exchange National Bank, being thereupon on that same day (fol. 94) credited by the American Exchange National Bank with the amount thereof. On June 16th, after the filing of the petition in bankruptcy, the check passed through the New York Clearing House and was paid (fol. 95). Copies of the check and of the accompanying communication from Goldman, Sachs & Company to the bankrupts are set forth at length in the Master's Opinion at folios 91 to 93.

The National City Bank Check.

Also on June 15th, 1923, the petitioners "caused" (fol. 22) the National City Bank to deliver to the bankrupts its cashier's check for $1,294 payable to the order of the bankrupts "favor N. Latzko and A. Popper, Budapest." A copy of the check is set forth at length in the Master's Report (fol. 88). On receipt of this check on June 15th the bankrupts promptly credited the petitioners' account with the amount thereof and deposited the check in the regular course of business with the American Exchange National Bank being thereupon in turn credited by that

bank with the amount thereof (fols. 89, 90). On June 16th, after the filing of the petition in bankruptcy, the check passed through the New York Clearing House and was paid (fol. 90).

Facts Relating to Both Checks.

After the bankruptcy an indebtedness of the bankrupts to the American Exchange National Bank was in part satisfied by the application of the bankrupts' balance, as increased by the two deposits above referred to, and, thereafter, certain collateral held by the bank against the indebtedness was returned to the Receiver. It is against the proceeds of this collateral that the petitioners here file their reclamation claims.

Other Important Facts Applicable to Both Checks.

1. It is to be emphasized with respect to each of the two checks that the reclamation petition (fols. 22, 23) alleges, and the allegations stand admitted, that the petitioners herein "*caused*" Goldman, Sachs & Company and the National City Bank to deposit said checks for petitioners' account with the bankrupts. The legal effect of this fact is held by the courts below to be the same as though the petitioners had themselves deposited checks for their own account (fol. 252).

2. There is no evidence of any special agreement between the petitioners and the bankrupts with respect to the treatment of checks which petitioners caused various banks or bankers to deposit with the bankrupts in the manner above described.

3. Although it was admitted by the respondent that as a matter of fact petitioners had not theretofore drawn against their account with the bankrupts before checks deposited had been actually collected, there was no evidence offered to show that the petitioners did not have the *right* to draw before the checks were actually collected. While it is true, therefore, as stated by petitioners at page 5 of their brief that "the petitioners had no agreement with the bankrupt to treat evidences of debt, deposited with them for collection or otherwise, as a deposit of cash," there was also no agreement that petitioners' deposits were *not* to be treated as cash or that petitioners *could not* draw against deposits until after their collection. As the Master said (fol. 103):

> "* * * the burden is on the petitioner to prove a special agreement showing that it had *no right* to draw before collection."

Erroneous Statement of Fact in Petitioners' Brief.

There is no basis in the Record for the statement on page 3 of petitioners' brief that the bankrupts delivered the checks in question to the American Exchange National Bank "for collection." The very pages of the Record, 30 and 32, referred to by petitioners show that the bank credited the checks to the bankrupts' account immediately on their receipt. No mention is made anywhere of "collection."

Material Distinctions of Fact Between These Cases and The Rochling Case, No. 34.

1. In the *Rochling* case, *all* of the checks were payable

on their face to the order of the bankrupts "for account of" Rochling. In the present case the check of the National City Bank for $1,294 was similarly payable on its face to the order of the bankrupts "fa[illegible] of Latz-Kopper." But the check of Goldman, Sachs & Company for $15,000 was on its face simply payable to the order of the bankrupts and the information that it was paid to the bankrupts for the account of the petitioners was conveyed *in a separate accompanying communication.*

2. In the *Rochling* case, the reclamation petition did not specifically allege that Rochling had "caused" the deposit of the checks, as petitioners did allege in the present cases. But the correspondence between Rochling and their London correspondents indicated that in fact Rochling had caused the deposit to be made. The petitioners here point out that in the *Rochling* case, Rochling was credited with interest from the date that the checks were received for their account by the bankrupts. Petitioners here add (p. 8 of their brief) that they "received nothing on their deposits." *There is no evidence in the Record as to whether or not the petitioners in this case received interest. If the petitioners deemed it material to show that they received no interest, the burden was upon them to prove that fact.*

3. In order to complete the distinction of fact the respondent points out that the *Rochling* case was further strengthened by the appearance of the fact that Rochling desired credit for the amount of the checks transmitted to the bankrupts on a definite date, i. e. June 15th, and contracted with their correspondents for the payment on

that date. While such facts do not affirmatively appear in the Record in the present cases—in fact there is no evidence at all on the subject—it is to be presumed that international bankers dealing in transfers of large credits are at all times aware when they may expect credits to be placed to their account and to be made available for their use.

4. Certain other differences, pointed out by petitioners at pages 7 and 8 of their brief, exist but have no materiality; i. e., that the Goldman Sachs check of $15,000 was not a cashier's check; and that there was no evidence as to whether Rochling ever drew against their balances before collection of deposits. Why the legal rights of the parties are different in the case of the Goldman Sachs check, drawn upon another bank, than in the case of the National City Bank's cashier's check is not pointed out. And as to the absence of evidence of whether Rochling ever drew against its balance before collection of deposits, it need only be pointed out that the fact as to whether or not there *was* ever a drawing before collection *is immaterial, the only material question being whether a right to draw existed.*

Holdings Below and the Fundamental Error.

In all the cases, and with respect to all checks, the Special Master and the District Court concurred in holding that there was no reclamation rights because title to the checks had passed to the bankrupts on delivery on June 15, 1923. In the Circuit Court of Appeals it was held that the bankrupts did *not* take title on June 15,

1923, to the checks which were payable on their face to the order of the bankrupts "for account of Gebreuder Rochling" and "favor of Latzkopper" but that the bankrupts *did* take title to the Goldman Sachs check which was payable simply to the order of the Bankrupts despite the fact that there was an accompanying statement that the payment was made "for account of Latzko and Popper."

The Circuit Court of Appeals made the form of the face of the check the test. (Record in No. 34, page 36).

The basis of the Circuit Court of Appeals' distinction based on the form of the check is found in its reasoning that when the words "for account of" or "favor of" appear on the face of the check, notice is given to a third party endorsee of the capacity in which the bankrupts hold the checks, whereas when such notation does not appear on the face of the check, though it was given to the bankrupts with an accompanying instruction, the third party has no notice of the capacity in which the bankrupts held the check. *The fundamental error in this reasoning is that the only relationship in question here is that existing between the bankrupts and their depositors, Rochling in the one case, and Latzko in the other. The rights of third parties, endorsees from the bankrupts, are not here presented. The effect of notice to such endorsee is immaterial. The only question presented in all of these cases is what was the relationship* AS A FACT *between the bankrupts and their depositors.* Was the transaction such that in the absence of any special agreement the deposit of the checks with the bankrupts for account of their depositors passed

title to those checks to the bankrupts, as in the ordinary case of a deposit of checks by a depositor with his bank, under the rule of this Court's decision in *United States* vs. *Burton*, 196 U. S., 283. Whether or not a third party endorsee of the checks which on their face are payable for account of the depositor would be put upon notice as to what in fact was the relationship between the payee and its depositor is not the question presented. But even if the rights of a third party endorsee were here in question and he were held to be put on notice as to the nature of the relationship between the payee bank and its depositor, *it would still be a matter of fact to be proved as to what that relationship was.* Here an investigation by an endorsee would have resulted in the discovery that the relationship between the payee banker and its depositor—Rochling or Latzko—was after the credit of the checks, simply that of debtor and creditor, thus enabling the bankrupts to give to the third party endorsee good title to the checks. *Since, however, an endorsee's rights are not here involved, the Court need go no further than to determine the nature of that initial relationship between the bankrupts and their depositor.*

In the case where the Court correctly interpreted the problem as that of the relationship between the bankrupts and their depositors, i. e., in the case of the Goldman Sachs check for $15,000, the Court concluded, in accordance with respondent's contention, that the relationship existing was one of debtor-creditor. It was only when the Court became confused by considering the rights of possible third party endorsees that the Court measured the rights of the petitioners here by the form

of the check. The respondent contends that the relationship between the bankrupts and their depositors in all of the cases was the same as that which arose upon the delivery of the Goldman Sachs check and its credit to the account of the depositor.

POINT I.

As between the bankrupts and their depositors, the petitioners, the capacity in which the bankrupts received the two checks which the petitioners "caused" to be delivered to them for the petitioners' account depends upon the intention of the bankrupts and the petitioners. Under the rule of the Burton case the presumption is that those parties intended to create a debtor-creditor relationship. There is no evidence here to rebut that presumption.

The petitioners themselves alleged, and the Courts below have found as a fact, that the petitioners had "caused" Goldman, Sachs & Company and the National City Bank to deliver their respective checks to the bankrupts. As a result the conclusion was reached that "the legal effect of the transaction was the same as though the petitioners had themselves deposited the check 'for our account' with the bankrupts on June 15th and the latter had at once credited it to the petitioner" (fol. 252). Since the result of the petitioners' causing the checks to be deposited is the same as if they themselves

had deposited checks to their own credit with the bankrupts, the question presented here is the same as that raised in this latter situation.

A.

General Presumption in Favor of a Debtor-Creditor Relationship.

Of course the relationship ordinarily existing between the bank or banker and its depositor is that of debtor and creditor, and not principal and agent, or trustee and *cestui*. Since the leading cases of *Foley* vs. *Hill*, 2 H. L., 28, and *Bank of Republic* vs. *Millard*, 10 Wall., 152, this relationship has been recognized. In the latter case, this Court said:

> "It is an important part of the business of banking to receive deposits, but when they are received *unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys.* The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositor shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell in the House of Lords in the case of *Foley* vs. *Hill*, 2 Clark & Finnelly, 28, and they all concurred in the opinion that the *relation between a banker and customer, who pays money into the bank,* OR TO WHOSE CREDIT MONEY IS PLACED THERE, *is the ordinary relation of debtor and creditor,*

> *and does not partake of a fiduciary* character, and the great weight of American authority is to the same effect."

Whether, therefore, the *depositor* sends *moneys* to his banker, or money is sent *for his account* by third parties, by the depositor's direction or with his knowledge, the title to the money passes to the banker and simultaneously therewith there springs up a debtor and creditor relationship between the banker and his depositor.

The foregoing general rule of *Foley* vs. *Hill* and *Bank of Republic* vs. *Millard* as to the effect of the deposit of *money* by the depositor himself has been extended by the leading cases in this Court and in New York to the deposit of *checks* and other instruments by the depositor himself where the deposit has not been made under special circumstances or in pursuance of a special agreement showing that a different relationship, in fact, was *intended* to be created. Thus in *Cragie* vs. *Hadley*, 99 N. Y., 131, quoted with approval by this Court in *Burton* vs. *United States* (1905), 196 U. S., 283, at 302, the New York Court of Appeals said:

> "The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, of money, *or of drafts or checks received and credited as money*, the title to the money, *or to the drafts or checks*, is immediately vested in and becomes the property of the bank, is not open to question. (*Commercial Bank of Albany* vs. *Huges*, 17 Wend., 94; *Metropolitan Nat. Bank* vs. *Loyd*, 90 N. Y., 530). The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the cus-

> tomer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

In *Metropolitan National Bank* vs. *Lloyd*, 90 N. Y., 530, quoted with approval in the *Burton* case, the New York Court of Appeals said:

> It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. * * * If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, *but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.*

> "These show that it was the *intention* of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it, as Murray's agent."

In the *Burton* case (1905), 196 U. S., 283, the doctrine of the foregoing cases was approved, and this Court said:

> "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. * * There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction be-

> tween the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated."

And further:

> "There was no agreement or untaking of any kind other than such as the law makes from the transaction detailed, which was itself proved by uncontradicted evidence offered by the Government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property."

The doctrine of the foregoing cases has recently been applied by this Court in *City of Douglas* vs. *Federal Reserve Bank of Dallas*, 271 U. S., 489.

Compare the facts as stated by this Court in the *Burton* case with the facts in the present case. *In neither case was there any special agreement covering the deposit of the checks.* This Court in the *Burton* case emphasized that fact. In both cases the depositor had an account with the bank and in both cases checks were deposited therein. In the *Burton* case the check was deposited by Senator Burton himself, in the present case "the banks delivering these checks to Knauth, Nachod & Kuhne * * * were acting as agents of the petitioner, and the delivery of the checks to Knauth, Nachod &

Kuhne was the same as if they had been delivered by Latzko & Popper themselves" (fol. 102). In both cases the bank placed the amount of the checks to the credit of the depositor immediately upon the deposit of the checks (fols. 86, 89, 93). In both cases nothing further was said in regard to the matter.

This Court's conclusion in the *Burton* case is inevitable in the present situation—"it was the ordinary case of the transfer or sale of the check" by the petitioners through their agents and the purchase of the check by the bankrupts, and, on delivery to the bankrupts, title to the checks passed and there existed an indebtedness from the bankrupts to the petitioners for the amounts thereof.

Since the rule that the deposit of *money* by the bank's customer in the absence of a special agreement creates a debtor-creditor relationship has been extended to cases where *checks* are deposited by that customer, there is no reason why the same rule when applied to *money* deposited by third persons for the account of the depositor, should not likewise be extended to the deposit of *checks* by such third persons, *particularly when made pursuant to the depositor's direction as in the present case.*

The true test must be in all cases: Is there any evidence to show that as between banker and depositor a different relationship was intended to be created.

Of course, varying circumstances have been held sufficient to indicate that the relationship between banker and depositor was not *intended* to be that of debtor and creditor upon the deposit of checks, and that the relation-

ship was *intended* to be that of bailor and bailee, or principal and agent. Thus when a payee of a check *endorses* it to his banker *"for collection and credit,"* these words indicate that the payee-endorser does not intend to deposit the check, but intends only to constitute the banker his agent for collection and intends that the amount thereof should only be credited to depositor's account when the instrument is collected, and that then and then only should the relation of debtor and creditor arise.

All of this is well established law, as are the decisions of the Courts in the numerous cases relied upon by the petitioners, all to the effect that by endorsements in varying restrictive forms, the payee-endorser does not *intend* to divest himself of title to the instrument, but intends to constitute the endorsee his agent for the purpose solely of collecting the check for the endorser's account. *In other words, as between endorser and endorsee, the words of restrictive endorsement are held to indicate the* INTENT *not to transfer beneficial title.*

Those cases are wholly inapplicable to the present situation. Here the legal relationship between the bankrupts and the petitioners with respect to the checks must depend not upon the mere chance that the same words were used here by a third party bank as are ordinarily used by endorsors to create an agency relationship, but must depend upon the intention of the bankrupts and the petitioners. In the absence of evidence to the contrary, that intention is presumed by the *Burton* case to contemplate a debtor-creditor relationship.

B.

There is no Evidence Here to Rebut the Presumption Established by the Burton Case.

Inasmuch as it has just been shown that the relationship between the banker and the depositor is presumed to be that of debtor and creditor, the burden of proof is upon the petitioners here (the reclaimants below) to establish that some other relationship, such as principal and agent, existed. The petitioners have failed to sustain such a burden. There is no evidence of any special agreement to rebut the presumption. There is no evidence of any absence of right to draw against their credit immediately upon its creation. There is no evidence of any kind that the relationship was other than that which presumptively exists or that there was anything in the relationship of the parties from which an intention could be gathered that the petitioners constituted the bankrupts their agents to collect checks which the petitioners themselves had "caused" the New York banks to deposit for their credit.

There is no reason why a Court should be astute to discover special agreements that the relationship between the parties was intended to be other than that usually existing between banker and depositor. If such special agreements as desired, they may be easily and clearly made.

C.

Petitioners in their Points V and VI have failed in their attempt to distinguish the present Case from the Burton Case.

At pages 48 and 49 of their brief, petitioners unsuc-

cessfully attempt to prevent the application of the rule of the *Burton* case to this case.

The first three allegedly distinguishing features —that in the *Burton* case the depositors "received personally checks", "personally endorsed" them, and "personally delivered" them to the bank—constitute factual differences, but not distinctions which require the application of a different rule of law. Petitioners nowhere attribute any materiality to them.

Petitioners' fourth "distinction" that "there was no physical possibility for petitioners to draw at once on the bankrupts" is not true, but is immaterial if true. Petitioners might have disposed of their credit with the bankrupts by cable. Even if they *did not,* it is no proof that they had no *right* to.

Petitioners' "distinctions" numbered 5 to 9 are on analysis but two; (*a*) that no agreement existed under which the bankrupts were authorized to purchase deposits made for petitioners' account and (*b*) that petitioners had no right to draw against their deposits until after collection. The first (*a*), is conclusively answered by the rule of the *Burton* case which *presumes* a purchase by the bank and imposes a duty of proving a special agreement to the contrary on the person relying on such an agreement. The second (*b*), that a special agreement has been show, has no basis in the facts:

> "the evidence *shows* that Latzko and Popper *did not,* in fact, draw against their account with Knauth, Nachod & Kuhne until the items deposited were actually collected, but the evidence *does not show* that they had *no right to* draw before that

> time, *and the burden is upon the petitioner to prove a special agreement showing that it had no right to draw before collection.*" (Opinion of Special Master, fols. 102, 103).

Just as in *In re Jarmulowsky* (S. D. N. Y., 1917) 243 Fed., 632, Judge Learned Hand held that a creditor-debtor relationship depended "upon the depositor's immediate and unconditional *right,* and not merely as a *favor,* to draw upon the deposit," so conversely the material question here is the petitioners' *absence of right* to draw, and not the mere fact, as proven, that they *did not.* Petitioners have failed to sustain the burden of proving the absence of such right.

In making their final "distinction," petitioners are relying not on a distinction *in fact,* but on an assumption of the very legal conclusion which is the object of their entire brief. They claim that in the *Burton* case, at the time of deposit, there were no "instructions restricting negotiability." There were none here.

> "The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn (the bankrupts) that it was to be placed in the account of petitioners." (Judge Rogers, fol. 252).
>
> "But here the deposit was in the claimants' ordinary checking account. Instructions to place it to such account emanating from them, *and due to the necessity of indicating for whom the check was received,* create a different situation from that in *White* vs. *Miners National Bank,* 102 U. S., 658, where the deposit was in a bank where there was

an endorsement for account of A to the order of a bank in which *A had no checking account.*" (Judge A. N. Hand, fol. 118).

"I cannot believe that one who deposits a check in his own bank, in which he has an account," (or "causes" his agent to make the deposit for him, as here) "with a notation that it is for his (the depositor's) account, means that the title of the checks is to remain in the depositor until the bank collect it." (Special Master Stephenson, fol. 104).

D.

In Reply to Petitioners' Argument.

The fact that respondent's contentions lead to the conclusion that the bankrupts would have been liable to the petitioners for the amount of the checks credited to petitioners' account even if the checks had not been paid by the drawers—Goldman, Sachs & Company and National City Bank—is admitted.

Of course, if the bankrupts purchased the checks and did not take them solely for collection by virtue of some special agreement, the risk of loss was on them. If the bankrupts had distrusted the responsibility of the drawers of the checks and had deemed it desirable to protect themselves against the drawers' failure to pay them, they could have simply refused to accept the checks other than for collection. But these were transactions between well known banking houses in the same city and the bankrupts could well accept these New York checks as money and this, it appears, was their practise.

It is of course well known that since the decision of

this Court in the *Burton* case, many of the banks throughout the country, in cases where they deem it necessary, have protected themselves from the application of the rule in that case by very definite special agreements found in passbooks or on deposit slips. These express agreements have, in many instances, become necessary because banks receiving checks drawn by persons whose responsibility is unknown to them have found it unwise to assume the risk flowing from the rule of the *Burton* case. In the present case, however, the bankrupts made no special agreement and did not credit the checks solely for collection for the obvious reason that they deemed checks of the National City Bank and Goldman, Sachs equivalent to cash, which they safely could credit and upon which they could assume the risk.

Conclusion to Point I.

Accordingly, it is submitted that unless varied by the single circumstance that the New York banks carried out their instructions to create a credit by in one case, drawing their check to the order of bankrupts "in favor of Latzkopper" and the other case by drawing their check to the order of the bankrupts and delivering the same accompanied by instructions that it was "for the account of Latzkopper," the ordinary rule must apply that the relationship of debtor and creditor was created from the time of the receipt and credit of the checks, which the petitioners caused these banks to deposit.

It is therefore submitted that the doctrine of *Foley* vs. *Hill* and *Burton* vs. *United States* is applicable and leads to the conclusion that the beneficial title to both

checks passed to the bankrupts on June 15, 1923, and that thereafter the petitioners were no more than general creditors of the bankrupts.

POINT II.

The Court below correctly held that the bankrupts acquired title to the Goldman Sachs check prior to the bankruptcy and that the words "for account of" appearing in the letter covering the transmission of the check to the bankrupts did not constitute the bankrupts agents for petitioners but constituted them merely debtors as in the ordinary case of banker and depositor.

Referring to the letter which accompanied the Goldman, Sachs check, the Court below said (fol. 252):

> "* * * The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn, that it was to be placed in the account of the petitioners. This they did as the agents of the petitioners. The legal effect of the transaction was the same as though the petitioners had themselves deposited the check 'for our account' with the bankrupts on June 15th and the latter had at once credited it to the petitioners. * * * We think the transaction is governed by the rule laid down in the *Burton* case, and that the rela-

> tion between the petitioners and the bankrupts on June 15th, when this check was credited by the latter to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners."

This conclusion is obviously sound. By some method Goldman, Sachs & Co. had to inform the bankrupts why and for whose benefit the money was being paid, whatever the nature of that benefit. *The transaction required either some notation on the check or some accompanying memorandum.* How other than by the use of the words "for account" could Goldman, Sachs have indicated to the bankrupts the name of the firm having an "account" with them for whose benefit the check was being transmitted. *Even if the petitioners had caused Goldman, Sachs & Company to deliver to the bankrupts bullion instead of checks, Goldman, Sachs & Company would of necessity have had to accompany the bullion with the same information "for whose account" it was being paid.* In these latter circumstances it could not seriously be argued that the *money* delivered to the bankrupts under instructions that it was "for account of" Latzko and Popper was being transmitted for collection or otherwise restrictively—or other than as a deposit creating a debtor and creditor relationship. The mere fact that the payment was made by check of Goldman, Sachs & Company and was accompanied by a letter designating the account for whose benefit the payment was made cannot change the result.

A.

The Inapplicability of White vs. Miners National Bank, and Similar Cases.

The main argument advanced by the petitioners and the court below to justify their ignoring the rule of the *Burton* case is that, in a line of cases involving one form of restrictive *endorsement* and not dealing at all with the banking transaction here involved, the words "for account of" have been held by Courts to result in an agency relationship. That argument is the same as was unsuccessfully advanced in several recent cases in this Court* such argument being in effect that a word or phrase used under one set of circumstances always must have the same meaning even when used under wholly different circumstances and with a wholly different purpose.

Assuming, however, for the moment, that cases relating to endorsements have any relevancy at all to the problem presented by the present set of facts, the distinction between those cases and the rule to be applied in the present case is recognized by the Negotiable Instruments Law itself.

Section 66 of the Negotiable Instruments Law of the State of New York (Laws 1909, Chapter 43), which is Section 36 of the Uniform Negotiable Instruments Act, provides:

> "Sec. 66. *When indorsement restrictive.* An indorsement is restrictive, which either:

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*U. S. vs. *Chamberlin*, 219 U. S., 250, 262; *Price* vs. *U. S.*, 269 U. S., 492.

1. Prohibits the further negotation of the instrument; or

2. Constitutes the indorsee the agent of the indorser; or

3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

And Section 67 of the New York Act (Section 37 of the Uniform Act), provides as follows:

"Section 67. *Effect of restrictive indorsement; rights of indorsee.* A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;

2. To bring any action thereon that the indorser could bring.

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement."

From the foregoing sections, it is apparent that restrictive endorsements fall into two classes:—

(a) Those for the benefit of the endorser himself; and

(b) Those for the benefit of a third person.

Where an instrument drawn by A to the order of B is endorsed by B to C for account of B or for B's benefit,

then the rule is settled that B, the endorser, constitutes C merely the agent of B, and that neither the legal nor the beneficial title passes to C and that C becomes merely the agent of B to collect the instrument. In legal effect, the instrument is *a mere power.*

Where, however, an instrument drawn by A to the order of B is endorsed by B to the order of C for account of or for the use of D, then the rule is that B intends to and does divest himself of all legal title and that C obtains the legal title to the instrument which he holds *prima facie* for the use of D.

Hook vs. *Pratt,* 78 N. Y., 371.

But in this second class of cases, it is apparent that the question remains open as between the endorsee (C) and the third party (D), whether C, the endorsee, takes not only the legal title, but as against D, also the beneficial title. That question is one which depends wholly upon the arrangement which, in fact, exists between C and D. If by agreement, express or presumed, they have arranged that upon the receipt of this type of instrument, both legal and beneficial title shall pass to C and that a mere debtor and creditor relationship shall spring up, that is no concern of B who has divested *himself* of all interest in the instrument. If, in fact, no such agreement has been made, either expressly or by a course of conduct, or by any other method, then, of course, C would hold the proceeds for the use of D.

With these fundamental distinctions in mind, it becomes apparent that even if the principles underlying the restrictive endorsement cases are at all relevant

here, the cases relied upon by the petitioners are not inconsistent with the contentions of the respondent.

The petitioners and the court below relied mainly, if not entirely, on a line of cases which have as their original authority the decision of this Court in *White* vs. *Miners National Bank* (1880) 102 U. S., 658. An analysis of the *White* case, which is for this purpose an analysis of all of the cases following it, and a comparison of its facts with those of the present case furnishes the best illustration of why those decisions are inapplicable to the present circumstances and why the District Court was correct in holding that the checks in the present case had *not* been deposited for collection. In the *White* case the Miners Bank, the payee, by its president Brownell, endorsed drafts to the plaintiff White in the following manner:

> "Pay S. V. White or order for account Miners Bank, Georgetown, Colorado. J. L. Brownell, P't."

White paid the bank the amount of the drafts less a discount, and when the drafts were not paid at maturity sued the bank both on its endorsement and for money paid to the bank's use. The decision of this court was that the plaintiff might recover on its second count for money paid but in the course of its opinion, at page 661, it stated that:

> "It seems to us that the Court below correctly construed the effect of the endorsement to be to make White the agent of the bank for the collection of the money."

But in the *White* case, as in all of the other cases relied upon by the petitioners, the endorser endorsed to the endorsee for the *endorser's benefit,* and therefore intended to constitute the endorsee the endorser's agent to collect the drafts—a mere power—an endorsement of the first class under New York N. I. L., Sec. 66, quoted *supra.* Under these circumstances, neither legal nor beneficial title passes to the agent. *In none of these cases, however, was the question presented as to the respective rights of the endorsee and the third party for whose account the endorsement was made*—an endorsement of the second class under Sec. 66. In all the cases relied on by petitioners, the question was either as to the respective rights of the endorser and endorsee, or of the endorsee or a subsequent holder, as against the maker. In none was there a presumption, such as here exists, of the actual relation between the endorsee and the third party. In none was the instrument drawn at the instigation of the endorsee.

Again, in the *White* case, as in all of the cases relied upon by petitioners, the defendant-endorser had no account with the endorsee (White) for which "account" the endorsee received the drafts and to which "account" the amounts of the drafts were to be credited. The natural and reasonable construction of the endorsement in those cases was that the endorser (Miners Bank) intended to constitute the endorsee (White) its agent to collect the drafts from the third party drawees. Just as in the present circumstances the use of the words "for account of" could not have been avoided if the bankrupts were to be instructed for what purpose the pay-

ments were being made to them, so in the *White* case the use of the words "for account of" could have had no other meaning or purpose than to constitute the endorsee an agent for collection. In the *White* case the words did not have to be used to explain the source of the payment inasmuch as the transaction was between the only two interested parties. There was no payment by a third party for *another's* "account" which required explanation.

B.

The Parole Evidence Rule would not be violated, as claimed in Petitioners' Point I, if the circumstances surrounding the delivery of the check were investigated to determine the meaning of the phrase "Favor Of".

The petitioners contend in their Point I that because the phrases "for account of" "for collection," etc., have a settled meaning in the ordinary restrictive endorsement cases it would be a violation of the parole evidence rule to consider the circumstances surrounding the delivery of the checks here in question as a basis for determining the legal relationships resulting from such delivery. Petitioners' contention is unsound for three reasons.

1. *The very facts upon which respondent relies and which were relied upon by Judge Augustus Hand in the District Court* (fols. 117 to 118) *and by the Special Master in interpreting the meaning of the terms "for account of" or "favor of" were allegations contained in petitioners' own reclamation petition and facts offered*

in evidence by petitioners themselves. Judge Hand said (fol. 119) that "the effect sought to be given here to the words 'for account of' is contrary to the natural meaning of the words under the circumstances" by reason of the fact that "here the deposit was in the claimant's ordinary checking account. Instructions to place it in such account emanating from them, and due to the necessity of indicating from whom the check was received, create a different situation than that in *White* vs. *Miners National Bank*" (fol. 118).

The fact that the deposit was in the petitioners' ordinary checking account and the fact that instructions to place it in such account emanated from petitioners were facts *pleaded and proved by the petitioners. Indeed the Record contains no evidence of any kind, written or parole, offered by the respondent as to the meaning of "for account of."* The only evidence of any kind in the entire case, in the introduction of which the respondent had any part, was the evidence that the bankrupts credited petitioners with the amounts of the checks upon the days when the checks were received and that the American Exchange National Bank in turn credited the bankrupts when the bankrupts deposited the checks with that bank. Even these facts were not offered by the respondent alone but were put into the Record upon the joint stipulation of both parties (fols. 72 to 75). On such a Record this Court will not permit petitioners to assert here that the Special Master and the Court below were foreclosed from interpreting the meaning of the term "favor of" *in the light of the very facts adduced by the petitioners' own evidence.*

2. As a correlary to the foregoing, and since the respondent introduced no evidence whatsoever, except as above noted, the Record of course contains not a single objection or exception taken by petitioners to any evidence offered. *No exception having been taken petitioners cannot now be heard to object to the evidence introduced.* (See opinion of Learned Hand, D. J., in *Re Brown,* 189 Fed., at 437).

3. While the aforesaid two reasons dispose of petitioners' contentions it is equally apparent that they would be untenable if the evidence in question had been offered by the respondent and had been excepted to in a timely manner by petitioners for it has long been a well established limitation to the parole evidence doctrine that

> "In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it. Such facts are hereinafter called the 'circumstances of the case.' "
>
> *Chase's Stephen's Digest of the Law of Evidence* (Second American Edition, 1910), 229.

Wigmore, after tracing the development in the law away from the originally absolute parole evidence rule and the tendency toward the enlightened view that no document is complete in itself but must be read in the light of the circumstances under which it was executed,

states at page 3499, Section 2470 of his work on Evidence (1905):

> "The truth had finally to be recognized that words always need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document. 'Words *must* be translated into things and facts.' Instead of the fallacious notion that 'there should be interpretation only when it is needed,' the fact is that there must always be interpretation. Perhaps the range of search need not be extensive, and perhaps the application of the document will be apparent at the first view; but there must always be a travelling out of the document, a comparison of its words with people and things. The deed must be applied 'physically to the ground.' * * * Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and *that therefore all the circumstances must be considered which go to make clear the sense of the words,—that is, their association with things.*"

The quotations from *Wigmore* and *Chase* merely summarize the now established principle that in interpreting a written instrument extrinsic evidence of the "circumstances of the case" is admissible.

This is really no exception at all to the parole evidence rule. Parole evidence is not being considered to

controvert the meaning of the instrument. The circumstances surrounding it are simply examined to explain it. Thus in the present case the Special Master and the Court quite properly considered not only the checks themselves and their covering letters, but also the "circumstances of the case",—the fact that the petitioners maintained an "account" with the bankrupts; the fact that it was the petitioners who "caused" the three New York banks and bankers to deliver checks to the bankrupts, and the fact that, unless the banks and bankers had designated the account on bankrupts' books to be credited, bankrupts would not have known whom to credit.

Further authorities on this subject need not be here considered but reference is made to respondent's analysis at pages 35 to 38 of its brief in the *Rochling* case, No. 34, of the cases of

United States vs. *Bethlehem Steel Company* (1906), 205 U. S., 105;

Middleworth vs. *Ordway* (1908), 191 N. Y., 404;

Central Coal & Coke Co. vs. *Good & Co.*, 130 Fed., 793, 799.

The cases cited hold that words used in one set of circumstances need not have the same meaning as the same words used in different circumstances.

As said by this Court in *United States* vs. *Chamberlin*, 219 U. S., 250, 262, in construing the meaning of the word "debt":

> "A tax may or may not be a 'debt' under a particular statute, according to the sense in which the word is found to be used."

And in the same case, after distinguishing certain earlier cases where the word "debt" was held not to include a tax, the Court said that in those cases "the context forbade the conclusion."

> *Accord, Price* vs. *U. S.*, 269 U. S., 492, bottom 501.

And so here, therefore, the meaning of the words "for account of" or "in favor of" must depend upon the "sense in which the word is found to be used." Because in the endorsement cases an endorsement by B to C for account of B makes C an agent, with power to collect, and because in that class of cases perhaps a "contrary conclusion" is forbidden, that fact is of little aid in determining in what sense similar words are used where a depositor causes a deposit to be made in his own account and his bank is notified by a notation or memorandum that such deposit is in effect "for the account of" the depositor giving such instructions.

Conclusion to Point II.

In summary then, in the present case, the rights of the petitioners (not endorsees) are being considered and it is third parties, to wit, the *New York banks,* who used the allegedly restrictive words. Furthermore, in all the other cases which deal with *endorsements,* the only conceivable reason for the use of the word "for account of" was to create the endorsee a fiduciary, whereas in the

present case, as has already been pointed out, *even if no fiduciary relationship was intended,* there would have been no other way for the New York bank to indicate the person to be benefited by the payment other than by the use of such or similar words. Nor did the New York banks have the right to determine as between the bankrupts and the petitioners the effect of the deposit of the checks. *There is nothing in common between the circumstances of the present case and those of all of the other cases relied on by the petitioners, other than the simple fact that the same words "for account of" were used.*

POINT III.

The Court below erred in holding that the bankrupts took the National City Bank check for $1,294 in any different capacity than they took the Goldman Sachs check for $15,000.

As already pointed out in the preliminary statement on page 8, after having correctly concluded that the use of the words "for account of" in the letter accompanying the Goldman Sachs check was merely to indicate the account to be credited, with the result that the bankrupts took title to that check, the court then erred when it reached a different conclusion with respect to the National City Bank check where the words "in favor of" appeared on the face of the check. The cause of this error was the court's confusion in believing that the words on the face of the check, since they might have

affected the rights of transferees of the check, were at all material so far as petitioners' rights were concerned. Obviously this is error for, as already pointed out, in considering the relative rights of the petitioners and the bankrupts, the effect of notice to third parties and the rights of such third parties is unimportant.

That this was the reason for the court's reaching different conclusions in the two cases appears clearly from Judge Roger's Opinion (fol. 229). He said:

> "The petitioners alleged in their petition that on June 15, 1923, they caused the National City Bank of New York to deliver to the bankrupts this check to be collected for the account of the petitioners, and that it was to be so collected appears on the face of the check itself. For the words "Favor N. Latzko and A. Popper, Budapest," seem to us, on the whole, not to differ in effect from "Collect for N. Latzko and A. Popper, Budapest." *A check so drawn cannot be said to be freely* NEGOTIABLE. Any payee *to whom it was indorsed* would take the proceeds when collected not for himself but for N. Latzko and A. Popper."

It is obvious from this quotation that the court was not considering the question here presented, i. e., the relationship between the bankrupts and their depositors, the petitioners. The court was confusing the question actually presented with one involving the effect that the phrase "in favor of," when appearing on the face of a check, might have *on a subsequent endorsee* of the bankrupts (their bank, the American Exchange National Bank, for instance). It might be that the appearance of such a phrase on the face of a check would put an en-

dorsee such as the American Exchange National Bank on notice to inquire what *in fact* was the relationship between the endorser and the person for whose "favor" the endorser had received the check. If no such inquiry were made and the endorsee bank gave credit to its endorser it might do so at the risk of learning later that as a fact the check belonged not to the endorser but to that other person for whose favor the endorser had received it. Here, however, such inquiry would have established *the fact* that the bankrupts had acquired title to the check.

So far as the payee endorser himself was concerned, however, the phrase in question does not constitute notice, for the instructions of the transmitting bank, in this case the National City Bank, cannot effect the actual relationship existing between the payee, the bankrupts in this case, and their depositors, the petitioners.

That the Circuit Court of Appeals misapprehended the problem and that it was considering the possible rights of subsequent endorsees rather than the relationship between the bankrupts and petitioners is further substantiated and almost conclusively proven by the distinction recognized by that court between the case where the phrase "favor of" appeared on the face of the check and where it did not. *If the phrase was notice to the bankrupts of anything, it was just as much notice to the bankrupts whether it appeared on the face of the check or in a covering letter to them.* The only additional effect which would result from the appearance of the phrase on the face of the check is, as the Court itself stated, in connection with its "negotiability;" i. e., the

notice which it might give to subsequent endorsees. The rights and liabilities of such subsequent endorsees are not presented here and yet it is clearly their rights and liabilities that the Circuit Court was considering, for, at folio 230, in considering the effect of the appearance on the face of the check of the phrase "N. Latzko and A. Popper Budapest" it said:

> "A check so drawn cannot be said to be freely *negotiable.* Any payee *to whom it was endorsed* would take the proceeds when collected not for himself but for N. Latzko and A. Popper."

The use of the word "negotiable" and the consideration of the effect of "endorsement" was what the Court had in mind. It is true that the Court referred to any "*payee* to whom it was endorsed" but that simply indicates a further confusion. A payee's rights do not depend on endorsement.

That as between the bankrupts and the petitioners the use of the words "in favor of" on the face of the check did not constitute the bankrupts agents for collection but established a debtor and creditor relationship upon the credit of the check to the petitioners' account, has already been shown by the discussion in the previous points. The only answer made by the petitioners to this argument is its discussion of the cases of which *White* vs. *Miners National Bank* is typical. The inapplicability of the doctrine of those cases to the transactions here involved has already been sufficiently discussed in Point II and need not here be repeated.

POINT IV.

The judgment of the Circuit Court of Appeals should be affirmed insofar as it denies the petitioners' right of reclamation to the proceeds of the Goldman Sachs check and should be reversed insofar as it granted the petitioners' reclamation claim to the proceeds of the National City Bank check.

Respectfully submitted,

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Petitioner in No. 49.

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Of Counsel.

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CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 48

ALEXANDER LATZKO, *et al.*, trading as Latzko & Popper,
Petitioners,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Respondent.

No. 49

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

against

ALEXANDER LATZKO, *et al.*, trading as Latzko & Popper,
Respondents.

MEMORANDUM OF ADDITIONAL AUTHORITIES

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Supreme Court of the United States

OCTOBER TERM—1927.

ALEXANDER LATZKO, *et al.*, Petitioners, *against* THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc., Respondent.	No. 48
THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy, etc., Petitioner, *against* ALEXANDER LATZKO, *et al.*, Respondents.	No. 49

MEMORANDUM OF ADDITIONAL AUTHORITIES.

In their reply brief filed herein, at page [illegible] Messrs. Latzko & Pepper quote a small portion from an opinion of LEHMAN *J.*, in *P. V. Bureaucratic Co., Ltd.* vs. *Guaranty Trust Company*, a case which has never been officially reported but which appeared in the New York Law Journal for November 12, 1921. This case, which

has not been relied on by either party in the lower courts, was undoubtedly obtained by the petitioners from the brief which the Guaranty Trust Company sought to file herein as *amicus curiae* because of the latter's interest as petitioner in the case of *Guaranty Trust Company* vs. *G. F. Grohe-Heurich & Co.*, No. 545, in which an application for a writ of *certiorari* is now pending undecided before this Court. The question raised in the Guaranty Trust Company's case is closely related to that raised in the present case.

It is believed that the whole opinion of LEHMAN, J., should be before this Court for it clearly sustains the Trustee's argument that the words "for account of," when used in connection with the deposit of funds, do not always indicate an agency relationship. Judge LEHMAN's opinion reads as follows:

> "The complaint alleges that the defendant deposited with the Empire Trust Company in February, 1916, the sum of $1,740,000 for account of the plaintiff 'as per contract made on their behalf.' This deposit was made 'by order' of the Russo-Asiatic Bank. On the 6th day of January, 1917, the Empire Trust Company paid to the defendant the sum of $1,140,000 for the account of the plaintiff, and the defendant credited this amount on its books to the plaintiff. On January 13, 1917, the defendant received a cable from the Russo-Asiatic Bank as follows: 'Credit amount received Empire Trust Company account Baranowsky works our account,' and on January 24 the defendant notified the Russo-Asiatic Bank: 'In accordance with your cable of January 13 we have credited your special account with $1,140,000 value

January 6 received from Empire Trust Company account Baranowsky.' On the same day the defendant notified the plaintiff that it had received a cable from the Russo-Asiatic Bank 'requesting us to credit their account with the $1,140,000 value January 6. We have accordingly debited your account with the foregoing amount value January 6.' Thereafter, on March 13, 1917, the Empire Trust Company paid to the defendant the sum of $602,169.86, 'being the balance of the money received by the Empire Trust Company from the Guaranty Trust Company of New York for account of the plaintiff on February 13, 1916.' On the same day the plaintiff delivered to the Empire Trust Company a letter from the Russo-Asiatic Bank disclaiming any interest in the moneys received by the Empire Trust Company in February, 1916, and stating 'that these moneys belong to P. V. Baranowsky & Company,' and the plaintiff also delivered to the defendant a letter directing it to place the sum of $602,169.86 which it would receive from the Empire Trust Company to the credit of P. V. Baranowsky & Co. On the following day the plaintiff delivered to the defendant another letter, in which it directed the defendant to make payments from this account in the sum of $35,000 and to place the balance, amounting to $567,169.86, 'to the credit of Russo-Asiatic Bank, Petrograd, for account of P. V. Baranowsky Company, Ltd.' The defendant has complied with these directions, but has not repaid to the plaintiff or to the Russo-Asiatic Bank for the account of this plaintiff the sums of $1,140,000 and $567,169.86, which it holds on deposit 'to the credit of the Russo-Asiatic Bank for account of the plaintiff.' The defendant has demurred to the com-

plaint on the ground that it fails to state facts sufficient to constitute a cause of action, and now urges that the complaint shows merely a deposit to the credit of the Russo-Asiatic Bank, creating a debt to that corporation which the plaintiff has no right to demand from the defendant. The plaintiff does not contend that if the Russo-Asiatic Bank had in fact collected the amount deposited to its credit for the plaintiff's account the defendant would have been obliged to pay this amount to the plaintiff also, but it does contend that when the defendant received the moneys from the Empire Trust Company for the account of the plaintiff it became indebted to the plaintiff for the moneys so received and that the subsequent placing of this amount to the credit of the Russo-Asiatic Bank 'for account of the plaintiff,' though made by the defendant with the plaintiff's consent or even by its direction, did not constitute a payment of this indebtedness or a novation, but that in effect this was merely a bookkeeping entry made to facilitate the collection of the debt due to the plaintiff, through the Russo-Asiatic Bank as agent, and that the plaintiff could at any time revoke this agency and demand from the defendant the payment of the debt. For the purpose of this motion I will assume without further analysis of the allegations of the complaint that when the defendant received these moneys from the Empire Trust Company for the plaintiff's account it became indebted to the plaintiff in this amount and bound to pay it to the plaintiff on demand. Thereafter the rights of the parties were the same as if the deposit in plaintiff's favor had been made by the plaintiff itself. Ordinarily I think it cannot be questioned that the direction of a depositor to

transfer the account of another when acquiesced in by both the bank and the new creditor constitutes a novation whereby the bank accepts a new creditor in place of the original depositor in consideration of the cancellation of its indebtedness to the latter. As between the bank and the original creditor there is a good consideration for the contract of novation, and if as between the old depositor and the new depositor there is any ground for setting aside the assignment of the original indebtedness of the bank, this can be done only in an action between these parties. In the present case, however, the plaintiff claims that it never consented to a substitution of creditors or directed that the deposit should be transferred to the Russo-Asiatic Bank, but only that the deposit be transferred to the credit of the Russo-Asiatic Bank for plaintiff's account; that the moneys deposited never belonged to the Russo-Asiatic Bank, and that that bank acknowledged in the letter delivered to the Equitable Trust Company on March 13, 1917, that it had no claim to such moneys and that they belonged to the plaintiff, and finally that in authorizing the defendant to place the moneys to the credit of the Russo-Asiatic Bank for the plaintiff's account it gave notice to the defendant that the moneys were still the property of the plaintiff and that the Russo-Asiatic Bank was merely its agent for collection. The statements contained in the letter of the Russo-Asiatic Bank to the Empire Trust Company might create an estoppel if acted upon by the Empire Trust Company, but in any action between other parties they would constitute merely an admission which might perhaps be introduced in evidence, but which would not conclusively establish

the truth of the statement. The validity of the plaintiff's contention must therefore depend upon the effect to be given to the form in which it authorized that the moneys on deposit be placed to the credit of the Russo-Asiatic Bank. It has been frequently held that an indorsement of a negotiable instrument 'for the account' of the indorser makes the indorsee not the full owner of the instrument, but merely the indorser's agent for collection. From the very nature of the contract embodied in the negotiable instrument these words can have no meaning except that the party primarily liable on the instrument should pay them over only for the benefit of the person making the restrictive indorsement. *A deposit in a bank to the credit of one party for the account of another or an authorization to transfer a deposit account to the credit of another for the account of the original depositor can and frequently does, however, have other purposes than mere collection, and this is particularly true when the account is in favor of a bank doing business in another city.* It can and undoubtedly frequently does happen that a deposit is made in a New York bank to the credit of an out-of-town bank for the account of the depositor upon an arrangement made with the out-of-town bank that as soon as the deposit is made the depositor may draw upon the out-of-town bank, or upon an arrangement made with the out-of-town bank that the deposit when made shall cancel a pre-existing debt. There is no allegation in this case that no such agreement was made with the Russo-Asiatic Bank, or that no advances were made by such bank to the plaintiff on the faith of this deposit to the credit of the Russo-Asiatic Bank; there is no allegation that the words 'for

the account of' have any well-established meaning in the banking community; there is not even an allegation that the moneys originally on deposit belonged to the plaintiff and not the Russo-Asiatic Bank. At most there are allegations of evidentiary facts from which an inference might be drawn that the plaintiff was the owner of these moneys and that the change in the form of deposit gave notice to the defendant that the plaintiff always continued to own the moneys. The court should not now pass upon what allegations might be sufficient to constitute a cause of action against the defendant, but it seems clear that in the absence of allegations that the moneys on deposit belonged to the plaintiff; that the change in the form of deposit was made merely for collection; that the defendant had notice of these facts and that no advances have been made by the Russo-Asiatic Bank upon the faith of the deposit to its credit for plaintiff's account, no action will lie by this plaintiff against the defendant after it is shown that plaintiff authorized the defendant to place the moneys to the credit of the Russo-Asiatic Bank for plaintiff's account. The complaint contains no allegations of such facts, but at best allegations from which inferences that such facts exist might be drawn, and a complaint which contains only allegations from which an inference of fact might be drawn is insufficient (*De Cordova vs. Sawvide*, 165 A. D., 128, reversed on opinion of Ingraham, J., 214 N. Y., 662). Plaintiff's motion for judgment is therefore denied, with $10 costs, and with leave to serve an amended complaint within twenty days after notice of entry of order herein, upon payment of said costs. Settle order on notice." (Italics are ours).

For the convenience of the Court reference is also made here to the case of *Marvin* vs. *Martin* (C. C. A., 6th 1927) 20 Fed. (2d) 746, which will be cited on the argument. The case was not referred to in earlier briefs because of the fact that it was reported for the first time in the Federal Reporter Advance Sheet of September 29, 1927.

Respectfully submitted,

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Respondent in No. 48
Petitioner in No. 49.

GODFREY GOLDMARK,
GEORGE G. ERNST,
RALPH F. COLIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 48 and 49.—October Term, 1927.

Alexander Latzko, William Latzko, Charles Latzko, et al., Petitioners, 48 *vs.* Equitable Trust Company of New York, Trustee in Bankruptcy. Equitable Trust Company of New York, Trustee in Bankruptcy, Petitioner, 49 *vs.* Alexander Latzko, William Latzko, Charles Latzko, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

This case, here on petition and cross-petition for certiorari to review a judgment of the circuit court of appeals, involves the same bankruptcy and questions similar to those considered in No. 34, *Equitable Trust Company of New York* v. *Rochling, et al.*, decided this day. Petitioners in No. 48, respondents in No. 49, later referred to as "claimants," are bankers of Budapest who had a checking account with Knauth, Nachod & Kuhne, the bankrupts. On June 15, 1923, they procured a credit with the bankrupts through the deposit with the latter by the National City Bank of New York of its cashier's check, payable to the bankrupts' order, "favor N. Latzko & A. Popper, Budapest." On the same day, Goldman, Sachs & Co., bankers in New York, delivered to the bankrupts their check, drawn on the Bank of America in New York, and payable to the bankrupts, accompanied by a letter stating that the check was "for account of Latzkopper, Budapest". The bankrupts immediately credited both checks to the claimants, but they were not collected until after the bankruptcy petition had been filed on the following day. The proceeds of collection are traced into the hands of the trustee in bankruptcy and the

present proceedings were brought for their reclamation in the district court for southern New York. The petition was dismissed. The court of appeals for the second circuit reversed the order of the district court as to the National City Bank check and affirmed it as to that of Goldman, Sachs & Co. [*In re Gubelman,* 10 Fed. (2d) 926], holding that the words in the former, "favor N. Latzko and A. Popper, Budapest," appearing on the face of the check, were restrictive and made the bankrupts agents for collection, but holding as to the latter that the words appearing in the letter accompanying the delivery of the check served only to indicate the account to be credited.

Two circumstances are said by claimants to distinguish this case from No. 34, *Equitable Trust Company* v. *Rochling, et al.,* just decided. The first is the fact that the check involved in the claimants' petition was not a cashier's check, but the check of a bank drawn upon its own bank of deposit. The distinction seems to us to require no difference in result where, as here, the check was treated by the bankrupts as current funds and at once placed to the credit of the claimants. It is suggested also that although it was the practice of the bankrupts to credit checks to claimants as soon as deposited, it does not affirmatively appear that claimants asked or expected them to be credited in advance of collection or that the items were listed as immediately entitled to interest. But the mere absence of such proof cannot limit the effect of the dominant facts before us that the establishment of the credit was the objective of the claimants, and that that objective was attained when the credit was given. *Douglas* v. *Federal Reserve Bank,* 171 U. S. 489; *Burton* v. *United States,* 196 U. S. 383. We cannot assume, in the absence of proof, that claimants, whose controlling purpose was to secure a credit with Knauth, Nachod & Kuhne, were unwilling to accept the credit, when given, because it anticipated the collection of the paper by twenty-four hours. There is then no basis for the distinctions attempted, and this case is controlled by our decision in No. 34. Considering the checks in the light most favorable to claimants, as though the language relied on appeared on the face of both checks, claimants are nevertheless only general creditors of the bankrupts and their petition was rightly denied by the district court. The judgment of the district court is affirmed and that of the court of appeals is affirmed in part and

Reversed in part.